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3/59
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46102

GRACE G. DARBY, Appellant, v. JOHN DONAHUE and ALLANMAR CORPORATION, a corporation, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant Donahue, as owner of a tavern, and Allanmar Corporation, as the owner of the premises, under the Dram Shop Act, for personal injuries inflicted by Marian Loomis, allegedly intoxicated, caused in whole or in part by intoxicating liquors sold to her by defendant Donahue. Upon a trial with a jury a verdict was returned finding defendants not guilty. A special finding was also returned by the jury, that Marian Loomis was not intoxicated at the time of the alleged assault. Motions to strike the special verdict and for a new trial were denied, and judgment for defendants was entered upon the verdict. Plaintiff appeals.

It appears that plaintiff and Marian Loomis were on the occasion in question patrons of this tavern. Sometime between midnight and one o'clock in the morning, an altercation occurred between the two women, who had been sitting close by at the bar in the tavern. There is a sharp conflict in the evidence as to whether Marian Loomis, charged with the assault, was intoxicated and assaulted plaintiff,

or whether plaintiff was intoxicated and, because of her condition, fell from her stool at the bar to the floor, which resulted in the injuries to her.

In view of the conclusion we have reached, we express no opinion upon the question as to whether the verdict and special finding were against the manifest weight of the evidence, or whether, conversely, the evidence amply supports the verdicts.

Where there is a sharp conflict in the evidence, it is necessary that the court correctly instruct the jury, especially where the instruction complained of is a peremptory one. Pappas v. Peoples Gas, Light & Coke Co., 350 Ill. App. 541, and cases there cited. It was there also held:

> "It is reversible error to give an instruction imposing a duty upon defendant greater than that required by law."

Instruction No. 20, given for defendant, reads:

> "The Jury are instructed that the plaintiff can not recover at all in this case unless you believe that the plaintiff has established by a preponderance or greater weight of evidence each of the following propositions:
>
> 1. That Marion Loomis was, in fact, intoxicated at the time of the occurrence in question.
>
> 2. That the plaintiff was injured as a result of the intoxication of Marion Loomis, if you believe that Marion Loomis was intoxicated at the time of the said occurrence.
>
> 3. That the defendant John Donahue, or his bartender, sold or gave alcoholic liquor to Marion Loomis.
>
> 4. That the alcoholic liquor so sold or given to Marion Loomis, if you believe any was sold or given to her, caused, in whole or in part, her intoxication, if you believe that she was, in fact, intoxicated.
>
> 5. That as a result of the intoxication of

> Marion Loomis, if you believe in fact she was intoxicated, Marion Loomis struck and assaulted the plaintiff.
>
> 6. That immediately prior to and at the time of the said occurrence, if you find that Marion Loomis in fact did strike and assault the plaintiff, the plaintiff did not provoke Marion Loomis to strike or assault her.

> "The burden of proving each and every one of the foregoing propositions is upon the plaintiff. If you find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence those propositions as stated, or that she has failed so to prove any one of them, the plaintiff can not recover from the defendants and you must find the defendants not guilty."

This was clearly a misstatement of the law. It erroneously placed the burden upon plaintiff to prove that she did not provoke Marian Loomis to strike or assault her, assuming, as the instruction does, that Marian Loomis did assault plaintiff.

In Reimenschneider v. Neusis, 175 Ill. App. 172, 174, the court said:

> "If plaintiff's gestures were malignant and taunting, defendant was not justified in striking the first blow, as such gestures are never a justification even for a common assault. Clark's Criminal Law, 215, and authorities cited in note 175. Nor do mere abusive words justify an assault. Sorgenfrei v. Schroeder, 75 Ill. 397; Gisler v. Witzel, 82 Ill. 322; Price v. People, 131 Ill. 223; Scott v. Fleming, 16 Ill. App. 539."

In Ogden v. Claycomb, 52 Ill. 365, 366, the court said:

> "If he strikes a blow not necessary to his defense, or after all danger is past, or by way of revenge, he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error."

To the same effect are Gizler v. Witzel, 82 Ill. 322, 325; Hulse v. Tollman, 49 Ill. App. 490, 497.

We observe the record recites that instruction No. 20 was given for the plaintiff. Obviously, this is a typographical error, since both sides in their briefs and oral argument agreed it was an instruction given for the defendant.

Defendants argue that instruction No. 19, given for plaintiff, cured the error contained in instruction No. 20. That instruction did not deal with the question of who had the burden of proof, but merely stated as a proposition of law that if, under all the evidence, they found that plaintiff did not provoke the assault, plaintiff could recover. Instruction No. 19 correctly stated the law. We think instruction No. 20 clearly instructed the plaintiff out of court.

Other questions raised by plaintiff need not be considered.

For the error indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KILEY AND LEWE, JJ. CONCUR.

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46261

CHARLES G. LIND and WALLACE SCHWAB, Appellees, v. HARRY SPANNUTH, ALVINE P. SPANNUTH, et al., Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

13 I.A.2d 112

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs, lessees of the premises here in controversy, filed a complaint in equity to cancel a three-year written lease. Defendants, lessors, answered and filed a counterclaim for rent. The court dismissed the complaint and counterclaim for want of equity, without costs. Defendants appeal.

The parties executed a three-year written lease commencing April 1, 1952 for the premises known as 349 Ashland Avenue in the Village of River Forest, Cook County, Illinois. According to the complaint the premises were to be used for "the photo finishing business and in developing of photographic film and the making of prints from the negatives and carrying merchandise and supplies for the general commercial trade."

The complaint alleged that plaintiffs had no knowledge of the provisions of the zoning ordinances of the Village but relied solely upon the representations of the defendants that the use plaintiffs intended to make of the leased premises was permissible under the zoning ordinances and that in February, 1953, when plaintiffs

moved their equipment out of the premises, they learned for the first time that the zoning ordinances of the Village prohibited plaintiffs' use of the premises.

In their answer defendants denied that the zoning ordinances of the Village forbade the use of the premises for "a photo finishing business and the development of films," and averred that plaintiffs knew that prior to the execution of the lease the tenants who preceded plaintiffs used the premises for the same business.

Defendants' counterclaim asked for judgment for rent which accrued from March 1, 1953, when plaintiffs abandoned the premises, to the date of the judgment. Plaintiffs filed an answer to the counterclaim.

Subsequently plaintiffs filed a motion for summary judgment asking for a finding that the parties executed the lease in question "for premises to be used in violation of law and is null and void." Whereupon defendants made a motion to strike plaintiffs' motion for summary judgment for the reason that plaintiffs failed to file affidavits in accordance with Section 57 of the Civil Practice Act, Rule No. 15 of the Illinois Supreme Court, and Section 4 of Rule 31 of the Superior Court.

Upon denial of defendants' motion to strike plaintiffs' motion for summary judgment, defendants filed an affidavit of defense to the motion for summary judgment, alleging in substance that when the former owner vacated the premises on July 1, 1950 defendants leased the premises to one Ray Samak who took possession and operated a "photo finishing

business of developing photographic films and making prints from negatives for general and wholesale trade"; that on July 1, 1951 Samak sold his business to one Dorothy Bradish who entered into a one-year written lease with defendant; that Bradish took possession of the premises and operated her business "which business was similar in all respects to the business previously operated by Samak"; that in March 1952 plaintiffs bought the business from Bradish and entered into the lease here involved; and that beginning April 1, 1952 plaintiffs "took possession of the premises and operated a photo finishing and processing business until some time during the month of February 1953," when plaintiffs vacated the premises.

The court found "that it appears from the uncontradicted facts in the record that the lease involved was executed with the intent by both parties thereto that the premises in question be used for a purpose in violation of law." The judgment appealed from was entered on the pleadings, no evidence being adduced by either party.

Defendants contend that a lawful use existing at the time of the adoption of the zoning ordinance may be continued as a permissible nonconforming use. Under the provisions of Chapter 51, Section 48a, Illinois Revised Statutes, State Bar Edition, the trial court and this court take judicial notice of zoning ordinances of the Village of River Forest. See Charles v. City of Chicago, 413 Ill. 428; Board of Education v. Idle Motors, Inc.,

339 Ill. App. 359; Cassidy v. Triebel, 337 Ill. App. 117. Under the original zoning ordinance which the Village of River Forest adopted in 1931, the use of the premises here in controversy for a photo finishing business was a lawful use. Chapter 84, Section 7, of that code provides that "Whenever a use district shall hereafter be changed, any resulting nonconforming use of the buildings in such changed district may be continued as though the change had not occurred * * *." February 13, 1951 the Village adopted an ordinance amending the code of 1931, which zoned defendants' premises as a "C use district" subject to Chapter 84, Section 7, which permitted the continued use of the defendants' premises for a photo finishing business as alleged in the Affidavit of Defense.

The order dismissing the complaint and counterclaim for want of equity recites: "The above cause coming on to be heard upon the motion of plaintiffs for summary judgment and the defense of defendant filed thereto." Although the record does not show that the court ruled on plaintiffs' motion for summary judgment we cannot consider that part of the order dismissing the complaint for the reason that plaintiffs have not filed a cross-appeal.

In their answer to the counterclaim plaintiffs deny that defendants are entitled to rent after removing their property from the premises on the ground that the lease "was executed for a purpose in violation of law." Plaintiffs' intentions, their lack of knowledge of the provisions

of the zoning ordinances of River Forest, or defendants' alleged representations with respect to the zoning ordinances, are immaterial, since under the authorities last cited the trial court is, as is this court, bound to take judicial notice of the zoning ordinances of the Village of River Forest.

No valid defense having been interposed to the counterclaim we are, therefore, impelled to reverse that part of the order dismissing the counterclaim and remand the cause with directions to enter judgment for the amount of the rent which accrued under the terms of the lease.

For the reasons given, that part of the order dismissing the complaint for want of equity without costs is affirmed, and that part of the order dismissing the counterclaim for want of equity without costs is reversed and remanded for further proceedings not inconsistent herewith.

AFFIRMED IN PART AND REVERSED
AND REMANDED IN PART.

FEINBERG, P.J., and KILEY, J., CONCUR.

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3 I.A.2d 113

GWENDOLYN LYLES, Individually and as Administrator of the Estate of Stella King, Deceased, ENICE LYLES, CLAUDINE OUSLEY and MAMIE FIELDS, Plaintiffs and Counter-Defendants-Appellants, 46307 v. CARRIE STANFORD, et al.; E. G. PAULING AND COMPANY, a Corporation, HERMAN MONROE BENNETT, Administrator-de-bonis-nOn of the Estate of Mazie Fields Davie, Deceased, Defendants and Counter-Defendants-Appellees, CARRIE STANFORD, MAGGIE STEWART, NEALY HORSEY and OSCAR HORSEY, Defendants and Counter-Plaintiffs-Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a complaint in chancery in the Superior Court of Cook County alleging that they are the owners of an undivided interest in certain improved real estate, sought partition, asked that a certain deed and mortgage trust deed be set aside and for an accounting with respect to rents. Defendants , answering, denied the material allegations of the complaint and said that plaintiffs were not entitled to any relief. One of the defendants, E. G. Paulding and Company, a corporation, is the owner and holder of a note representing an indebtedness secured by a trust deed as a first lien on the property and plaintiffs asked that the trust deed be set aside as a cloud on their title. Certain of the defendants filed a counterclaim

averring that plaintiffs had no interest in the premises and praying that the title of the counterclaimants be confirmed subject to the trust deed, that the claims of plaintiffs be removed as clouds on the title, that a receiver be appointed and that plaintiffs account for the rents. The mortgagee was made a defendant to the counterclaim.

On March 20, 1953 a petition for a change of venue, signed by all the plaintiffs and verified by the affidavit of one plaintiff who said that "she is making this affidavit on her own behalf and on behalf of her co-plaintiffs," was filed. It was sought on the ground of prejudice of six judges, including the judge to whom the case was assigned. On March 27, 1953, before the decision of the chancellor on the petition for a change of venue, the attorney for plaintiffs submitted an affidavit by each plaintiff stating that he had read the petition theretofore filed, knows the contents, has knowledge of the facts and that the petition is true in substance and in fact. The court denied the petition for a change of venue.

Following the denial of their petition for a change of venue, plaintiffs actively participated in the proceedings before the judge who had entered that order. On July 1, 1953, the case was set for trial on July 8, 1953. On July 8, 1953 an order of default and that the counterclaim be taken as confessed was entered against the plaintiffs and the mortgagee, and the trial was continued to July 17, 1953. On that date plaintiffs' complaint was

dismissed for want of prosecution. On July 23, 1953 counterclaimants obtained a decree awarding the relief sought by the counterclaim. On October 19, 1953 plaintiffs filed a notice of appeal from the decree of July 23, 1953, entered on the counterclaim.

Defendants say that the appeal should be dismissed for failure to file an adequate record as required by Rule 36 of the Supreme Court and Rule 1 of this court. We allowed the motion of appellants to dispense with the filing of an abstract on condition that the appeal be limited to the alleged error in denying the petition for a change of venue. Plaintiffs have confined their argument to the point that error was committed in the denial of their motion for a change of venue. We are of the opinion that the rules contemplate that in some cases taking up the entire record by the appellant is unnecessary. In some cases everything would necessarily go in. In other cases certain matters could be omitted in order to save expense. Sometimes it may be essential to appropriately negative the presence of certain pleadings or matters that might affect the case. We are of the opinion that the record in the instant case adequately presents all the facts necessary to a decision of the point on which appellants rely. Therefore, the motion to dismiss the appeal is denied.

The mortgagee asserts that plaintiffs are in no position to claim as to it that they were prejudiced by the denial of their petition, pointing out that they permitted their complaint on July 17, 1953 to be dismissed for want

of prosecution. This defendant calls attention to the fact that there is no appeal from the decree of July 17, 1953. No appeal was taken therefrom within ninety days as required by the Practice Act. We agree that the order of July 17, 1953, dismissing the complaint for want of prosecution, was a final order. However, it did not dispose of the case on the merits and that dismissal order is not res judicata as to the issues made by the complaint and the answers. The countercomplaint sought relief against the plaintiffs and it recognized the validity of the mortgage. Should the counterdefendant join issue on the allegations of the countercomplaint, the validity of the mortgage might again become an issue as in the original complaint. As there was no adjudication of any issue between the plaintiffs and the mortgagee, we hold that plaintiffs have a right to contend that they were prejudiced by the denial of their petition.

Appellees say that the petition for a change of venue was not presented in apt time. The report of the hearing before the chancellor on March 27, 1953, when he denied the petition, shows that the appellees resisted the request for a change of venue on the ground that it was not verified "by all those who made the application." There was no contention that the petition was not presented in apt time and appellees are in no position to urge that point at this time.

Appellees insist that the petition and the verification are insufficient as to form. Section 3, Ch. 146, Ill. Rev. Stat. 1953, requires every application for a change of venue to be made by petition which shall be "verified by the

affidavit of the applicant." Section 9 states that when there are two or more plaintiffs or defendants, a change of venue shall not be granted unless the application is made by or with the consent of at least three-fourths of the parties plaintiff or defendant, as the case may be. All that the statute requires where there are two or more plaintiffs (counterdefendants) as in this case, is that three-fourths of them consent to the change of venue. Here all of them signed the petition. The truth of the petition was sworn to by one of them who stated under oath that she "is making this affidavit on her own behalf and on behalf of her coplaintiffs," naming them. To overcome the objection that the petition was not verified by all those who made the application, plaintiffs tendered the affidavits of all the plaintiffs that he or she had read the petition by him or her subscribed, knows the contents thereof, has knowledge of the facts and that the petition is true in substance and in fact. We are convinced that the petition was in proper form. See Yedor v. Chicago City Bank & Trust Co., 323 Ill. App. 42; Talbot v. Stanton, 327 Ill. App. 491.

Finally, appellees argue that the error, if any, in denying plaintiffs' petition for a change of venue was waived by their subsequent participation in the proceedings before the chancellor. The record shows that on July 23, 1953, when the draft of the decree was presented to the chancellor for entry, the attorney for the plaintiffs said, among other things, that "the court has no jurisdiction

to enter the decree for the reason that a change of venue was applied for and denied." There can be no doubt that the chancellor knew that he had previously denied plaintiffs' petition for a change of venue. The views expressed in Balaszek v. Blaszek, 405 Ill. 36, 41, do not apply to the factual situation in the case at bar. In Talbot v. Stanton, 327 Ill. App. 491, upon the denial of the defendant's petition for a change of venue, the case was heard by the motion judge from whom the change was sought and plaintiff therein contended that the participation in the trial by the defendant's attorneys constituted a waiver of the right to a change of venue. Answering this contention we said (494):

> "To so hold would make the right to a change of venue of little practical use. A litigant having a meritorious cause of action or defense who was wrongfully denied a change of venue would suffer a judgment to be entered against him as in case of default if he elected to stand on his petition. If he waived his right under his petition for change of venue he would submit his cause or defense to a prejudiced judge. In either case the purpose of the statute would be defeated."

In People v. Scott, 326 Ill. 327, our Supreme Court said (341):

> "The spirit of our laws demands that every case, whether a statutory proceeding or otherwise, shall be fairly and impartially tried, and no judge should think of presiding in a case in which his good faith in so doing is open to such serious question as that presented by this record. These provisions of the statute should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as not to defeat the right attempted to be attained therein."

The right to a change of venue is not affected by the fact that there is no merit in the cause or defense of the parties seeking the change. Knickerbocker Ins. Co. v. Tolman, 80 Ill. 106; Talbot v. Stanton, supra.

The motion for a change of venue having been made in apt time upon a petition in proper form and the right not having been waived, it was error to deny the change of venue and all subsequent orders should be rescinded. See Mockler v. Thomas, 273 Ill. App. 121; Yedor v. Chicago City Bank & Trust Co., supra; Talbot v. Stanton, supra. Therefore the decree of the Superior Court of Cook County is reversed and the cause is remanded with directions to grant the change of venue and to rescind all subsequent orders affecting the rights of plaintiffs.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

NIEMEYER, P.J., and
FRIEND, J, Concur

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3 I.A.2d 114

46177

WILBUR F. NOWELL, Appellant, v. CHICAGO TRANSIT AUTHORITY, a municipal corporation, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff Wilbur F. Nowell sued Chicago Transit Authority for personal injuries alleged to have been sustained from a fall on the stairway of the Wilson Avenue Station, operated and maintained by defendant. Trial by jury resulted in a verdict finding defendant not guilty, and at the same time the jury answered affirmatively the special interrogatory reading: "Was that portion of defendant's stairway properly lighted where plaintiff is alleged to have fallen?" Judgment was entered on the verdict. Plaintiff's motions for a new trial and for vacating and setting aside the special interrogatory were denied, and plaintiff appeals.

Nowell, fifty-seven years old, claims to have fallen while descending the steps leading from the train platform of the Wilson Avenue Elevated Station to the station proper on the street level. He testified that the accident occurred about two in the morning of April 5, 1949. The stairway from the train platform to the street-level station is a double one, eight feet wide, with a rail-

ing down the middle and a banister on either side. It consists of an upper and a lower section, divided by a landing halfway down. Plaintiff stated that he had descended the upper portion of the stairway, crossed the center landing, and was continuing down toward the lower portion of the stairway on the right-hand side, about a foot from the banister along the right side. He made no attempt to hold onto it, and was smoking and talking with his friend Albert Williams, who was on his left. When plaintiff was about halfway down the lower section of the stairs he fell, landing on his back on the bottom of the stairway.

In response to a telephone message which he had received about eight o'clock of the evening of April 4, 1949, plaintiff went that same evening to visit Albert Williams at his apartment located at 6143 Ellis avenue. Plaintiff made the trip on the elevated line, starting out from Wilson Avenue L.Station. He testified that he went up the stairway that he later used on his return trip, but on the opposite side, and noticed that "the area on the steps where I subsequently fell was dark at this time." It developed that Williams wished to obtain his army discharge papers which were in the storeroom of Nowell's hotel, and the two men started back from Williams' apartment about twelve-thirty, using elevated transportation, and arrived at the Wilson Avenue Station about 2:00 a.m.

Plaintiff charged and sought to prove that the stairs were insufficiently lighted, and that a strand of wire on the lower half of the stairway caused him to trip and fall. Considerable evidence was adduced as to the lighting of the stairway. Both plaintiff and Williams testified that the section of the stairway where the accident occurred was "dark," and that all the lights above that section were off or had been removed. However, plaintiff conceded that the steps were "not in total darkness." He stated that there were six to eight lights above this particular section of stairway, that all of them were out, and that the condition of darkness which he said existed at the time of the accident also existed at eight o'clock in the evening when he had ascended the stairway to take the train to Williams' apartment on the south side. Defendant produced station porters who were on duty in shifts around the clock. They testified substantially that there were seventeen lights above this particular section of stairway, that although light bulbs occasionally burned out they were replaced immediately, that none of the lights over the stairway were ever out for more than a few minutes--the time that it would take to replace them--and that all the lights never went out at the same time.

With respect to the coil of wire, both plaintiff and Williams testified that plaintiff caught his right heel on a coil of bailing wire lying on the steps,

tripped and fell. Williams stated that he picked up the wire, rolled it up as small as he could, and threw it into a corner behind the doors. Plaintiff states that he did not see this wire at all before he tripped over it, and that after he fell Williams took the wire off his shoe, showed it to him, rolled it up and threw it to one side. Defendant's witnesses, the porters who inspected and cleaned the stairway regularly and frequently--their schedule required several cleanings nightly--testified that they never saw or heard of any piece of wire on the stairs, nor did they find any at the place where Williams said he threw it. In any event, there is no evidence as to when and how that piece of wire was placed there or how long it had been there, or that defendant had any notice of any such wire on the stairway.

It should be noted that this is what is commonly known as a "blind" case in that defendant did not learn of the alleged accident or of plaintiff's claim until some six weeks later, when formal statutory notice was served. It would serve no useful purpose to go into further detail as to the evidence adduced upon the hearing. Whatever evidence there was pertaining to the charges of insufficient lighting and the presence of wire on the stairs as contributing to the accident was fairly submitted to the jury. After careful examination of the record we have reached the conclusion

that the evidence is reflected in the jury's finding, and we would not be justified in setting it aside on the ground that it was contrary to the manifest weight of the evidence.

Plaintiff originally contended that defendant owed plaintiff the highest degree of care, but upon oral argument his counsel admitted error in this respect and conceded that only reasonable care was required on the part of defendant.

As additional ground for reversal it is urged that plaintiff was prejudiced by unwarranted remarks of defendant's counsel pertaining to plaintiff's work record, and his insobriety on several occasions while still in the Cook County Convalescent Home. None of these remarks had any reference to the date on which the accident occurred, and, while they would better have been omitted, we do not think they were so prejudicial as to constitute reversible error.

Lastly it is urged that instruction No. 12, offered by defendant and given to the jury, was erroneous. The instruction reads as follows: "The Court instructs the jury that if you believe from the evidence that the stairway in question was properly lighted at the time plaintiff is alleged to have fallen, you will find the defendant Not Guilty, for it is the law that before plaintiff may recover he must show by a pre-

ponderance or a greater weight of the evidence, that the defendant, in the exercise of ordinary care, actually knew of the presence of the alleged wire on its stairway or that the wire in question was upon the stairway for a sufficient length of time for the defendant to have known of its presence." As heretofore stated, the jury, by their special interrogatory, found that the stairs were properly lighted. The alleged presence of the piece of wire was not of material importance, in the absence of evidence of actual or constructive notice to defendant. No evidence was adduced on the question of notice or knowledge; consequently, the instruction could not have misled the jury.

The case resolved itself into a question of fact and the credibility of the witnesses whom the jury heard and had an opportunity to evaluate. We find no convincing reason for reversal, and therefore the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE J., Concur.

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3 I.A.2d 115

46147

ANTON KUCERA, Appellee, v. STEBER MANUFACTURING COMPANY, a corporation, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action to recover a balance claimed to be due him for wages, upon an oral contract of employment as a laborer in defendant's foundry. Upon a trial with a jury, a verdict was returned in plaintiff's favor for the amount of the claim plus interest at 5% from May 22, 1945. Motions for new trial and for judgment notwithstanding the verdict were overruled and judgment entered upon the verdict, from which judgment defendant appeals.

The complaint alleged that defendant employed him May 9, 1944, on the basis of $1.22-1/2 per hour and $1.93-3/4 per hour for overtime. The answer denied that plaintiff was employed at the rate of wages claimed, but alleged that the employment was for $1.00 per hour and time and a half for overtime. The contract of employment, which terminated May 22, 1945, was made during the war period.

Plaintiff testified that defendant hired him on the basis of $1.00 per hour for the first week and thereafter promised to pay him $1.22-1/2 per hour and time and a half for overtime, and that defendant would apply to the War Labor

Board, then existing by Act of Congress, for approval of the promised increase of pay, as required by the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 901).

Executive Order No. 9250 (7 Fed. Reg. 7871), as amended by Executive Order No. 9381 (8 Fed. Reg. 13083), provided in substance:

> "1. No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases."

It appears from the evidence that defendant made no application to the War Labor Board for approval of the wage increase, and the claimed increase was not paid.

Defendant contends that even if such promise to apply for approval was made, nevertheless the agreement relied upon by plaintiff was in violation of the regulations referred to and unenforceable. Plaintiff counters by suggesting that plaintiff is entitled to recover for breach of contract, because of the deliberate failure and refusal of defendant to make application for approval by the War Labor Board. Plaintiff also contends that the agreement relied upon falls within the exception provided for in the regulation referred to, which reads as follows:

> "Provided, however, That if the salary rates in question are not in excess of the minimum of those prevailing for similar job classifications within his own organization or if no such rates are available, then within the local area on September 15, 1942, the approval of the Commissioner is not required." (T. D. 5295, 8 Fed. Reg. 12429, at page 12432, adopted September 4, 1943.)

Therefore, the agreement does not violate the regulations relied upon by defendant.

We cannot agree with plaintiff's position. The promise to increase plaintiff's wages, if made, was a violation of the regulations and unenforceable, and was so squarely held by this court in Lefkowitz v. Enoz Chemical Co., 340 Ill. App. 421 (Abst.), and cases there cited. The exception in the regulations, relied upon by plaintiff, applied to salary rates, not wages. Section 1002.6 of said regulation defines salary rates as meaning "all forms of direct or indirect compensation for personal services of an employee * * * other than wages (as defined in the General Regulations and in orders or ruling of the Board)." The definition in a statute or ordinance must control. City of Chicago v. Pielet, 342 Ill. App. 201; McCann v. Retirement Board, 331 Ill. 193, 199.

In Vogel v. Pekoc, 157 Ill. 339, the court held that the statute which gives the right to recover attorney's fees in suits for wages applied only to wage earners. In Buren v. Mercury Press, Inc., 280 Ill. App. 217, 219, this court, construing the same statute (Ch. 13, §13, Ill. Rev. Stat. 1953), held that the section referring to wages did not apply to a salesman employed on a salary basis.

Whenever it appears to a court that an agreement is void as against public policy, and even if the question is not raised by a party to the action, it is not only proper but necessary that the court sua sponte interpose the defense. First Trust & Savings Bank v. Powers, 393 Ill. 97, 103, 104; Valdez v. Viking Athletic Ass'n, 349 Ill. App. 376.

The judgment of the Circuit Court is reversed.

REVERSED.

KILEY AND LEWE, JJ. CONCUR.

3 I.A.2d 113

46186

BARR & COLLINS, a Corporation, Appellee, v. LOUIS SEIDEN, Appellant, and LORNA SEIDEN; CHICAGO TITLE & TRUST COMPANY, a Corporation, as Trustee; GEORGE L. ELLEFSEN, and UNKNOWN OWNERS, Defendants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant Seiden from a decree allowing mechanic's liens in favor of plaintiff and intervening petitioners Ellefsen and Kartheiser.

Defendant Seiden filed a counterclaim against Ellefsen, alleging that Ellefsen did not fully perform his contract; that the work performed by Ellefsen under the contract was not in a good workmanlike manner; and that after allowing Ellefsen all just credits due him upon the contract, there was due and owing to Seiden the sum of $1,570 necessarily expended for completing the work under the contract and rectifying defects in the work performed by Ellefsen.

The cause was referred to a master, who heard the evidence and made his report, recommending subcontractor's liens in favor of plaintiff for $3,993.81 plus interest at 5%;

in favor of intervening petitioner Kartheiser in the sum of $1,655.70 with interest at 5%; and in favor of Ellefsen, who held the prime contract, in the sum of $5,684.84, which included extras ordered by Seiden, less the sum of $5,649.51, representing the claims of plaintiff and Kartheiser, leaving a balance of $35.33 due Ellefsen. Certain credits claimed by Seiden, including cost of completing the Ellefsen contract, were allowed by the master. After exceptions to the report were overruled, the decree appealed from was entered.

Seiden was in the fire insurance adjusting business for over 32 years. With respect to the proposed construction of his home, he testified, "On this particular building I acted as my own general contractor and let all contracts with the various trades. There was no need of employing anyone other than myself as superintendent or supervisor of the work. I acted as my own superintendent. I let the painting, plastering, glazing, roofing, plumbing and heating separately to different people." He made a written contract for the sum of $8,980 with intervening petitioner Ellefsen to do all the carpenter work. Ellefsen, in turn, made subcontracts with plaintiff and Kartheiser for the lumber and millwork.

There is no dispute as to the delivery of the material by plaintiff and petitioner Kartheiser, nor the reasonable value of the materials.

The evidence shows that Seiden appeared on the job three or four times each week during the progress of the work. The controversy arises between Seiden and Ellefsen as to the character of the work performed by him. He complained

principally about the installation of the windows, the floor and floor joists, the millwork, frames and sash. These complaints, though numerous, came near the completion of the work by Ellefsen, although Seiden observed the work as it progressed from week to week. Seiden appears to have been very critical of the contractor, and testified, "I complained to Ellefsen. He said he would make it good. I said I want it perfect. That is what I told Ellefsen about all of these things. I wanted a perfect job and insisted upon it." (Italics ours.)

It appears also that Ellefsen offered to correct the conditions complained about, but Seiden refused to permit him to do so. He refused to make further payments on the contract, and Ellefsen was compelled to leave the job and did not entirely complete the work called for by the contract.

It further appears that according to the terms of the written contract between Seiden and Ellefsen, monthly payments were to be made to Ellefsen. Seiden paid $3800 to Ellefsen on account of his contract but did not demand or procure from Ellefsen the affidavit required by Section 5 of the mechanic's lien statute (Ch. 82, Ill. Rev. Stat. 1953). That section in substance provides that it is the duty of the owner to demand and procure from the contractor, before he pays or causes to be paid to said contractor, or his order, any moneys or other consideration due or to become due such contractor, or make any advancement of any moneys, a statement in writing, under oath, of the names of all parties furnishing material and labor and of the amounts due or to become due each.

[illegible]

Such payment, if made without compliance with Section 5, is declared to be a wrongful payment to the contractor under Section 32 of said Act. Kiefer v. Reis, 331 Ill. 38, 46; Ceco Steel Products v. Couri, 311 Ill. App. 297, 300.

We have carefully reviewed the evidence heard by the master. It would unduly extend this opinion were we to detail the complaints made by Seiden involving the many items entering into the job performed by Ellefsen and the conflict of testimony concerning them. We are convinced that Ellefsen substantially complied with his contract, as found by the master, which is all the law required of him. Peterson v. Pusey, 237 Ill. 204; Edward Edinger Co. v. Willis, 260 Ill. App. 106; Errant v. Columbia Western Mills, 195 Ill. App. 14.

The difficulty with Seiden's position is that he demanded of Ellefsen a perfect job, a requirement not contained in the written contract.

The master heard and saw the witnesses, and his findings having been approved by the chancellor, we should not disturb his findings unless they are contrary to the manifest weight of the evidence. Wurth v. Hosmann, 410 Ill. 567, 574.

We consider the decree fully justified, and the same is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

[illegible]

138 A

46295

JOSEPH DE GRAZIA, Appellant, v. ARTHUR BICKOFF, CECELIA C. SIREIKIS and PARK RIDGE MOTORS, a Corporation, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

3 I.A.2d 116

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages based on the alleged conversion by defendants of an automobile. Defendant Cecelia Sireikis counterclaimed to recover an alleged loan of $1800. The court without a jury found for defendants on the complaint and for plaintiff-counterdefendant on the counterclaim. Plaintiff Pankow was dismissed from the case. De Grazia, called plaintiff herein, has appealed from the judgment on the findings.

Plaintiff and Cecelia Sireikis, called defendant herein, lived in the same household for about six years prior to January 18, 1952. In July, 1950 plaintiff bought a Chrysler automobile. The certificate of title issued to defendant. The automobile insurance policy was issued to plaintiff and defendant. The financing was done in defendant's name. Plaintiff made most, if not all, of the payments.

Plaintiff and defendant used the automobile until January 18, 1952 when they separated. That day she executed an assignment of the certificate of title to him and Pankow. Defendant's signature on the assignment was notarized by plaintiff. Thereafter she used the automobile to move to Park Ridge, Illinois. She "returned" the car in March. She

had "new keys" made and on the night of April 18, 1952 she drove the car away without the knowledge of plaintiff. She traded the Chrysler in upon the purchase of a new car from the Park Ridge Motors through Arthur Bickoff. In the transaction she applied for and received a duplicate certificate of title from the Secretary of State, stating in the application that the original was lost.

Implicit in the finding for defendant on the complaint is a finding that she was owner of the Chrysler automobile as a gift from plaintiff. Plaintiff contends the finding was against the manifest weight of evidence and that defendant did not prove a gift by clear and convincing evidence.

Plaintiff testified that he loved defendant, gave her "no presents except candy and flowers," gave her "rent free," but did not give her the Chrysler. He said he gave her the indicia of ownership, as well as deeds to real estate, in order to avoid payment of a judgment. He had no corroborating witness. Defendant testified she spent money living with plaintiff, paid some bills for utilities and his clothing and he received "wonderful gifts" from her family. She said that plaintiff gave her the Chrysler as a birthday gift. A friend of defendant testified that plaintiff had asked her how she liked the birthday gift he had given "my darling."

There are circumstances supporting each side of this issue. On plaintiff's side is the assignment of the certificate and delivery to him of deeds to real estate; the return to him of the car after the separation; and her testimony that he let her use the car after the separation and

that he said that if she would give him $1,800. she could have the car. On her side is the testimony that she executed the assignment under duress and that she took the car and traded it in. What transpired following the purchase of the Chrysler has a bearing only insofar as it throws light upon the question of whether plaintiff intended, and made, a gift at that time.

We think the trial court was in a better position than we are to appraise the credibility of the witnesses as they testified on the issues. The finding is not against the manifest weight of evidence.

Defendant had the burden of proving delivery of the Chrysler with intent to pass title. In re Estate of Nelson, 254 Ill. App. 484, 488. The defendant's case presumably convinced the trial court that the transaction was a gift. In Byerly v. Byerly, 363 Ill. 517, it "was established" that there was no intention to make a gift. That case is not applicable. We think the court was justified in deciding a gift had been made.

We need not pass on the points raised in this Court by defendant Bickoff. Nor need we discuss the finding on the counterclaim. No complaint has been made on that finding.

For the reasons given, the judgment is affirmed.

AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

139 A

46268

LORETTA O'DONNELL and F. MILLARD OAKES, Appellees, v. CECILIA SULLIVAN and WILLIAM C. SULLIVAN, her husband, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

3 I.A. 24 116

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In a suit for accounting and damages brought by the plaintiffs Loretta O'Donnell and F. Millard Oakes against William C. Sullivan and Cecilia, his wife, the complaint alleged that defendants had fraudulently procured a deed to improved real property, located at 6532 South Marshfield avenue, from Cecilia Sullivan's mother, Sarah Oakes. Thereafter the property was sold to bona fide purchasers. Defendants filed their answer denying the allegations of fraud and interposing the defense of laches. Issues being joined, the cause was referred to a master in chancery who, pursuant to hearing, filed his report recommending a decree in favor of plaintiffs and directing that defendants account for the proceeds received by them from the sale of the property and for the use and occupancy of the premises. Exceptions to the master's report were overruled by the chancellor, and the master's report was confirmed in all respects. The cause was then re-referred for an accounting. Defendants appeal from the order overruling the exceptions to the master's report and re-referring the cause to the master for an accounting.

This is a family altercation involving the home of Sarah Oakes who died in 1942, leaving seven children. The defendants had resided with her for seven years in the home in question prior to the execution of the alleged deed and continued to reside in the residence after the death of Sarah Oakes until 1951 without disclosing to the brothers and sisters of Mrs. Sullivan that a deed had been procured and recorded in December 1940, placing title to the property in the name of defendants. Plaintiff Loretta O'Donnell contends that she did not learn of the transfer until seven years after the deed was recorded, while the other plaintiff, F. Millard Oakes, claims that he did not learn of the transaction until the sale of the property to third parties in 1951.

Some eleven witnesses were called at the master's hearings, of whom only the physician, the handwriting expert and a bank employee were disinterested. Plaintiffs, by their own testimony, corroborated by the testimony of Mae Oakes, their sister's in-law, introduced evidence to the effect that Sarah Oakes' children were called to her bedside on Christmas Eve in 1940, when her condition was considered critical, that she lay helpless, unable to recognize anyone, and in a coma. They testified that she remained in that condition the next day, Christmas, and through December twenty-eighth. It is not denied that Loretta O'Donnell had a talk about finances with Cecilia Sullivan during Christmas week of 1940, that plaintiff suggested that they raise money on the house for their

mother, that the defendant made no reference to the deed which had already been recorded, and that plaintiff first learned of the existence of the deed in November of 1947. Plaintiff decided to take no action until the house was sold, and when this was accomplished in 1951, and no accounting made, she filed the instant proceeding in January 1952, well within the five-year period subsequent to learning of the transaction. F. Millard Oakes learned of the existence of the deed late in 1951.

Defendants testified on their own behalf, and offered as additional witnesses Lyla O'Brien (a daughter of Sarah Oakes), and William R. Sullivan, defendants' son. With the exception of the latter, who was only sixteen at the time of his grandmother's illness, they all testified that the deceased suffered a stroke on December twenty-fourth, but that she had made a quick, though partial, recovery from the accompanying paralysis. They all testified that she was lucid at all times, and that she signed the deed on December 28, 1940 of her own free will and without aid.

Dr. J. P. Graf, the attending physician, testified that he had been engaged in the practice of general medicine and surgery for about thirty-three years and was a member of the staff of St. Bernard's Hospital; that he had attended Sarah Oakes on previous occassions and treated her on December 24, 1940, when he made a house call. He stated that she was then in bed, incoherent, and had a paralysis on the right side due to apoplexy. He found hypertension

and prescribed the medication usual in cases of that kind. Dr. Graf saw her again on December twenty-sixth and thirty-first, and on none of his December visits did he feel that she recognized him. He testified that during the period from the twenty-fourth to the thirty-first her condition did not change at all--she was in a comatose condition, not an absolute coma, but was bewildered, paralyzed on the right side, and in his opinion did not have the use of her right arm at all. He saw her subsequently eight times in January, and much less frequently thereafter; by February her condition showed definite improvement, both mentally and physically. The doctor testified from files and records kept in his office, and he also had the benefit of medical tests. Dr. Graf was of the opinion that Sarah Oakes would not have been capable of executing the deed or any other paper requiring her signature on any one of the three days he saw her in December 1940 because, as he stated, she was incoherent and did not have the use of her right arm.

Vernon Faxon, a handwriting expert of many years' standing, was called as a witness by plaintiffs. He stated that he had examined the deed in question and compared the signature thereon with the signature on the First National Bank signature card, and discovered significant discrepancies. The size of the writing was different, as was the slant; the line quality of the writing, or the speed or fluidity, was definitely different; and the signature on the deed, instead of being continuously written as a signature, was more or less built up and slowly executed. He also noted that the name "Sarah"

on the deed was spelled "S-a-r-r-a-h"; that the "O" in "Oakes" was entirely different from the "O" of the "Oakes" on the bank signature card; that on the deed signature the "e" in "Oakes" was inserted after the "s" had been written, and that in other respects it was not a conventional "e." Because of these and additional variations, he had reached the conclusion that the two signatures were written by different persons.

The master who heard the witnesses found that neither the plaintiffs nor any of the other heirs at law of Sarah Oakes, except the Sullivans, had any actual notice of the alleged execution and recording of the deed in question until some time in November 1947, when Loretta O'Donnell made an investigation of the records of the Recorder of Cook County and then, for the first time, discovered that the deed had been recorded December 31, 1940. He also found that on December 24, 1940 Sarah Oakes suffered a stroke of apoplexy causing her to be paralyzed on the right side, that from that date and continuing for at least ten days she was in a comatose condition and did not have the use of her right arm, which was limp, that she was incoherent, unable to recognize persons of intimate acquaintance, and unable to understandingly transact any business. He found from the evidence of the physical and mental condition of Sarah Oakes at the date the deed was signed, as well as from the evidence of the handwriting expert, that the purported real estate conveyance of the Marshfield property to defendants was not the

understanding act of Sarah Oakes, that such instrument was fraudulent and of no effect as to the heirs because of the physical and mental infirmities of Sarah Oakes, of which the Sullivans had full notice. The master further found that in October 1951 the defendants Cecilia and William Sullivan sold the premises for the sum of $10,000.00 and invested the proceeds of the sale in the purchase of a home at 8624 South Ada street, Chicago, where they now reside. The purchasers of the Marshfield property knew nothing of the circumstances affecting the transfer to the Sullivans, and had a right to rely on the public records of Cook County.

The rule is well settled that where lay witnesses attempt to render testimony directed to the medical condition of a party in opposition to the testimony of a physician who had an opportunity to observe, treat and take medical specimens, the medical testimony should prevail. "The testimony of a witness especially trained in a branch of science which gives his judgment or conclusion as an expert, and is based on facts within his personal knowledge, cannot be controverted by the opinion of a lay witness; and, where a disease or disability is of such a character as to require skilled professional men to determine its existence, or cause, or whether it has ceased, expert testimony thereon must prevail over the testimony of nonexperts." 32 C.J.S. Evidence §572 (at page 422). This rule was followed in National Life and Accident Ins. Co. v. Martin, 214 Ind. 218, 14 N.E.2d 1018, and in this state in Prendergast v.

Retirement Board, 325 Ill. App. 638, wherein the court, quoting with approval from Peters v. Sacramento City Employees Retirement System, 27 Cal. App. (2d) 10, 80 P. (2d) 179, said that "'in cases of this character it is imperative to rely upon the testimony of those skilled in the science concerning which they are called upon to express an opinion, and their conclusion is conclusive on the question.'"

Defendants rely in part on the testimony of their counsel who was present at the time of the signing of the purported deed on December 28, 1940, who remained as counsel for defendants throughout the trial. However, the attorney nowhere states that in his opinion Sarah Oakes was mentally capable to execute the deed, although he was of the opinion that she "understood it." But see Avery Scale Co. v. Gottfried Brewing Co., 189 Ill. App. 430, as to the weight to be given to a witness who is also the acting attorney for one of the litigants.

Here the defense of laches is without validity. There is undisputed evidence that Mrs. O'Donnell did not learn of the existence of the deed until November 1947, approximately four years prior to the institution of these proceedings; and F. Millard Oakes did not learn of the transaction in question until shortly before the filing of the present suit. It also appears that within thirty days from the signing of the alleged deed defendants had an opportunity to disclose the transaction to Loretta

O'Donnell while discussing the expenses of Mrs. Oakes but had failed to do so. The courts have held that there can be no laches where there has been no knowledge, and that a mere delay will not bar relief where the injured party was ignorant of the fraud and filed his bill within a reasonable time after acquiring such knowledge. Duncan v. Dazey, 318 Ill. 500. See also Farwell v. Great Western Tel. Co., 161 Ill. 522, wherein the court said that "with reference to whether a cause of action is barred in equity, the rule may be stated, that where a cause of action arises from a fraud, the Statute of Limitations will not begin to run nor laches apply until the discovery of the fraud, or from the time when the fraud could have been discovered by exercise of reasonable diligence; but in the latter case the failure to use diligence is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other."

In the recent case of Bremer v. Bremer, 411 Ill. 454, suit was filed eleven years after the parties became aware of the transaction; nevertheless, the court refused the defense of laches, stating that the statute of limitations does not strictly apply to a suit in equity. And of course in determining whether a party should be deprived of a remedy and equity on account of delay in bringing suit, circumstances tending to explain or excuse such delay should be considered. Wright v. Wright, 242 Ill. 71.

After careful examination of the evidence, the master's finding and the rules of law applicable to the situation, we are convinced that the chancellor's order or decree of July 10, 1953 was proper, and it is therefore affirmed.

DECREE AFFIRMED.

NIEMEYER, P. J., and BURKE, J., Concur.

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3 I.A.2d 117

46250

THEODORE L. MEYER, Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
TOM DIMAS, Appellee.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff filed this action May 13, 1952 in the Municipal Court of Chicago to recover damages under the Federal Housing and Rent Act against defendant, his former landlord, for unlawful eviction. Upon motion of the defendant, the suit was dismissed, and it is from this order of dismissal that plaintiff appeals.

The principal question is whether the suit is barred by the statute of limitations.

Prior to the filing of the instant action, plaintiff on January 12, 1951, had instituted a similar suit, which was dismissed on October 11, 1951, on motion of the defendant. Plaintiff takes the position here that inasmuch as the second suit was filed within one year after the dismissal of the first action, the Limitations Act (Par. 24a, Chap. 83, Ill. Rev. Stat.) preserves the right of action as follows:

> "* * * or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

Defendant, however, asserts that since the time limited for the bringing of the action had expired prior to the bringing of the original suit and not during its pendency, the above statute is not applicable.

Both actions for damages were based upon the same eviction, it being charged that the defendant did not in good faith seek the premises for a member of his family, but instead rented the premises to someone other than a member of his family. The order of eviction was entered on October 20, 1949. Execution of the judgment was stayed for 90 days, and plaintiff vacated the premises on November 30, 1949. The premises remained vacant for a period of approximately two months before they were again rented by defendant.

The Housing and Rent Act, upon which recovery is predicated, provides (U.S.C.A. Title 50, App. Sec. 1895):

> "(c) Suit to recover liquidated damages as provided in this section may be brought in any Federal court of competent jurisdiction regardless of the amount involved, or in any State or Territorial court of competent jurisdiction, within one year after the date of violation * * *."

A period of almost fifteen months had elapsed before the bringing of the first suit. Inasmuch as the original suit was barred by the statute of limitations, the fact that a new suit based on the same cause of action was filed within one year after the dismissal of the first would not toll the statute of limitations.

The order of June 24, 1953 of the Municipal Court of Chicago dismissing the suit is affirmed.

Order affirmed.

Robson, J., concurs.

Tuohy, J., took no part.

148 A

3 I.A.2d 113

46286

SAMUEL S. BERGER et al.,
Appellees,

v.

ABRAHAM KOSDEN et al.,
Appellants.

46287

SAMUEL S. BERGER,
Appellee,

v.

2733 SPAULDING CORPORATION,
a Delaware corporation,
et al.,
Appellants.

Consolidated cases.

INTERLOCUTORY
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is a consolidated appeal from two interlocutory injunctional orders. Case No. 46286 involves the New Sawyer Corporation, an Illinois corporation, whose property is located at Milwaukee and Sawyer avenues, Chicago. Case No. 46287 involves the 2733 Spaulding Corporation, an Illinois corporation, whose property is located at Milwaukee and Spaulding avenues, Chicago. The orders appealed from require respondents to furnish plaintiffs, minority shareholders, with a stockholders' list; restrain the defendant corporations and the individual defendants who were officers of the respective corporations from communicating with the shareholders until the further order of the court; require the corporations to furnish

financial statements to the plaintiffs; and permit the minority stockholders to reply to the majority stockholders' letters. Both orders were entered without requiring a bond and without any recital in the orders that any cause was shown for waiving a bond.

The complaints allege that the New Sawyer Corporation, an Illinois corporation (hereinafter called the New Sawyer Illinois Corporation) has a capital structure of 3840 shares of common stock without par value; that the 2733 Spaulding Corporation, an Illinois corporation (hereinafter called the Spaulding Illinois Corporation) has a capital structure of 4013 shares of common stock without par value; that neither Illinois corporation has any outstanding preferred stock. The majority stockholders of the New Sawyer Illinois Corporation organized a Delaware corporation (hereinafter called the New Sawyer Delaware Corporation) with a capital stock of 3840 shares of preferred stock, par value $60, and an equal number of shares of common stock, having a par value of fifty cents. The majority stockholders of the Spaulding Illinois Corporation organized a Delaware corporation (hereinafter called the Spaulding Delaware Corporation) with 4011 shares of preferred stock having a par value of $40 and an equal number of shares of common stock having a par value of fifty cents. Under the terms of the charter the preferred stockholders of the New Sawyer Delaware Corporation would have a right on liquidation to $60 per share and were to be preferred to the extent of 4% per annum, cumulatively. The Spaulding Delaware Corporation

preferred stockholders were to have a preference in liquidation of $40 per share and were to be preferred to the extent of 4% per annum, cumulatively. The proposal of the majority stockholders was that all the stockholders, including themselves, were to receive share for share of preferred stock. They further proposed that all the common stock was to be given to the majority stockholders and none to the minority. In other words, out of this proposal the majority stockholders would not only get share for share of the preferred stock, but would get the entire block of common stock. The foregoing is admitted by the respondents.

Plaintiffs filed petition in each of the cases on September 21, 1953, setting forth that letters were sent to the stockholders, following the previous notice to them of the original plan to transfer the Illinois assets to the Delaware corporation, offering $65 in cash for a share of stock in the New Sawyer Corporation and $50 in the New Spaulding Corporation; that the disparity between the prices offered and the actual value of the stock was so great that the court should appoint an appraiser to determine the fair value before any other communications may be sent to the shareholders. Petitioners sought to get the facts with respect to the income and expenses of the property and to communicate them to their fellow stockholders because, as the petitions further allege, the majority stockholders had been buying stock at ridiculously low prices. The petitions then request that the stock so acquired be held to have been pur-

-4-

preferred to shareholders [illegible] a preference [illegible]
[illegible] of [illegible] preferred [illegible] preference [illegible]
of [illegible] common, respectively. The proposed [illegible]
are [illegible] are that all the stockholders, [illegible]
[illegible], may be [illegible] share of preferred [illegible]
[illegible] share of all the common stock [illegible]
given to the [illegible] stockholders and [illegible]
In other words, one of this proposal the [illegible]
would not only [illegible] share of the preferred [illegible]
[illegible] the entire stock or common stock. [illegible]
is admitted by the respondents.

Petitioners filed petition in each of the [illegible]
September 21, 1957, stating that [illegible]
the proceedings, following the previous notice [illegible]
the original petition [illegible] the Illinois [illegible]
Delaware corporation, offering $65 in cash for [illegible]
stock in the Delaware Corporation and $65 [illegible]
Securities Corporation, then the [illegible]

[illegible] the control of the stock [illegible]
[illegible] made applicant an [illegible]
[illegible] other [illegible]
[illegible] petition [illegible]
[illegible] and [illegible]
[illegible]
[illegible]
[illegible]
[illegible] the stock [illegible]

chased for the use and benefit of the corporation and that the petitioners be given a stockholders' list for the purpose of communicating with fellow stockholders, and for no other.

Verified answers were filed by respondents, setting out that the mergers mentioned in the petitions had been abandoned; that an appraisal had been made of the New Sawyer Corporation; that it had an income of $47,000 and a valuation of $225,000. A similar answer was filed with reference to the New Spaulding Corporation, setting out an income of $55,500 and a valuation of $250,000. These income and valuation figures were substantially less than those alleged in the petitions. The court then entered the interlocutory orders from which this appeal is taken and set October 16, 1953, for hearing on the petitions and answers.

Respondents objected to these orders on the sole ground that the court had no jurisdiction and was without power. In their briefs in this case, however, they raise the point that the injunction was issued without bond and without a waiver of bond. Where a party has been served with notice, is in court when an injunction is issued, and does not ask that a bond be fixed as part of the terms upon which a temporary injunction is issued, he cannot thereafter raise that point in this court. The statute requires a bond, but that is for the benefit of the party restrained and if he does not object in the trial court where the matter could be easily corrected, he cannot thereafter be heard to complain. A different situation exists where an injunction is issued

without notice because then the party has no opportunity to ask for a bond. That was the case in Grossman v. Grossman, 304 Ill. App. 507, and in all the cases in point cited by plaintiff which we have examined. (Lee v. Morris, 326 Ill. App. 555; Rossman v. Chapman, 312 Ill. App. 185; Drewrys Ltd. v. Drewrys Beers, Inc., 316 Ill. App. 307.) Russell v. Russell, 329 Ill. App. 580, sustains the position that objection must be made to the issuance of an injunction without bond where the party enjoined has an ample opportunity to make such objection.

Respondents in the trial court seem to have relied entirely on the objection that the court had no jurisdiction of the parties for the reason that the cause had been assigned to Chancery Calendar No. 2 of the Superior Court and was not on the calendar of the Hon.Donald S. McKinlay, one of the judges of that court; that the two chancellors hearing that calendar were Rudolph F. Desort and George Fisher; that a petition for change of venue having been filed from Judge Desort, the case should have been transferred to Judge Fisher and should not have been on the call of Judge McKinlay. However, there appears to have been no substance to this objection and they have entirely abandoned the point in their briefs. It is in any event without merit. Parties on appeal are limited to the theories of their cases and the defenses raised in the trial court. Blanchard v. Lewis, 414 Ill. 515; Hayward Co. v. Lundoff-Bicknell Co., 365 Ill. 537; Chicago Title and Trust Co. v. DeLasaux, 336 Ill. 522; Consumers

Petroleum Co. v. Flagler, 310 Ill. App. 241.

From an examination of the abstracts it appears that proposals were made to the minority stockholders, which on their face were wholly unfair to them and deprived them of the right to share equally with the majority stockholders in the proposed consolidations. Apparently, the respondents themselves were persuaded that they had no basis for such unfair proposals and abandoned the plans. Yet they followed up their proposals with offers to buy stock which, no doubt, the trial court considered were being made to the stockholders after pressure had been put on them by the proposed consolidations. To prevent the majority stockholders from taking advantage of their unfair proposals in connection with the consolidations the court entered the orders. They are temporary in character, and the record reveals there were no specific objections to them except lack of jurisdiction and lack of power. The orders were entered September 21, 1953, and a hearing was set for October 16, 1953. It was in this period of some twenty-five days that the majority stockholders were not to communicate with the other shareholders. What respondents apparently were interested in was preserving their point of lack of jurisdiction because of the transfer to Judge McKinlay's calendar after the change of venue from Judge Desort. What they seem to object to particularly in the orders is the restraint against communicating with the shareholders. While we affirm the orders on the ground that the objection thereto in the trial

court was the single point set forth above, this is not to be construed as an affirmance on any basis of merit of that portion of the orders restraining the majority shareholders from communicating with other stockholders.

Orders affirmed.

Robson, J., concurs.

Tuohy, J., took no part.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May ~~October~~ Term, A. D. 1954. | 3 I.A. 2d 189

General No. 9956 | Agenda No. 5.

Marian Heideman,
Plaintiff-Appellant,

Vs.

Willard V. Kelsey, as Executor of the Will of Charles Avery Hilliard, deceased, Frank Wyman Hilliard, Leah Hilliard and Gladys H. Gates,
Defendants-Appellees.

Appeal from Circuit Court of Macoupin County.

REYNOLDS, J.

This is a will contest brought by the plaintiff, Marian Heideman to test the validity of the will of Charles A. Hilliard, deceased. The cause was tried in the Macoupin County Circuit Court in December, 1951 and resulted in a verdict for the plaintiff-appellant here. The case was afterwards appealed to the Supreme Court, and on April 9, 1953 that court by its mandate reversed the judgment and remanded it to the Macoupin County Circuit Court for a new trial. On June 2, 1953, the cause was set for trial on Monday, June 15, 1953, being the third case set for trial that day. On June 15, 1953, the plaintiff, by her attorney, filed her motion for continuance, supported by her affidavit setting up reasons for a continuance. This motion was denied. On June 16, 1953, the cause was called for trial and the plaintiff renewed the motion for continuance and asked leave to file supplemental affidavit of William J. Becker, one of her attorneys, in support of her motion. This motion was

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

October Term, A. D. 1953. 3 I.A.1 83

General No. 9955 Agenda No. 5.

Marian Heideman,
Plaintiff-Appellant,

Va.

William V. Kelsey, as Executor of the will of Charles Avery William, deceased, Frank Wyman William, Leah William and Gladys G. Oates,
Defendants-Appellees.

Appeal from Circuit Court of Macoupin County.

MCYNCLDS, J.

This is a will contest brought by the plaintiff, Marian Heideman to test the validity of the will of Charles A. William, deceased. The cause was tried in the Macoupin County Circuit Court in December, 1951 and resulted in a verdict for the plaintiff-appellant here. The case was otherwise appealed to the Supreme Court, and on April 9, 1953 that court by its mandate reversed the judgment and remanded it to the Macoupin County Circuit Court for a new trial. On June 2, 1953, the cause was set for trial on Monday, June 15, 1953, being the third case set for trial that day. On June 15, 1953, the plaintiff, by her attorney, filed her motion for continuance, supported by her affidavit setting up reasons for a continuance. This motion was denied. On June 16, 1953, the cause was called for trial and the plaintiff renewed the motion for continuance and asked leave to file supplemental affidavit of William L. Becker, one of her attorneys, in support of her motion. This motion was

denied and the cause was continued to June 18, 1953, at 9:00 o'clock A. M. for trial. On June 18, 1953, the case being called, the plaintiff did not appear, but was represented by counsel. Defendant announced ready for trial, and plaintiff's counsel said that the plaintiff was not ready for trial. The court thereupon dismissed the case for want of prosecution. Afterwards, on July 17th, 1953, plaintiff filed a motion to vacate the order of dismissal and on August 18, 1953, this motion was denied. Plaintiff requested the vacation of the order of June 18, denying the motion for continuance and dismissing the cause of action for want of prosecution. It reviewed the proceedings in regard to the setting of the case for trial and the motion for continuance and the dismissal of the cause. It further set out the facts in regard to the unavailability of Chief Counsel, William J. Becker and included certificates from the Circuit Court of the County of St. Louis, Missouri, showing that the said attorney was engaged in a trial in that court on June 18, 1953. After the denial of this motion to vacate the order of June 18th, the plaintiff then appealed to this court.

Only one question is presented for decision, namely, whether or not the action of the trial court in refusing to grant continuance and dismissing for want of prosecution was error.

Section 183 of the Civil Practice Act provides as follows: "Additional time may be granted on good cause shown, in the discretion ~~direction~~ of the court and on such terms as may be just, for the doing of any act or the taking of any step or proceeding prior to judgment in any civil action."

denied and the cause was continued to June 16, 1953, at 10:00 o'clock a. m. for trial. On June 16, 1953, the case being called, the plaintiff did not appear, but was represented by counsel. Defendant announced ready for trial, and plaintiff's counsel said that the plaintiff was not ready for trial. The court thereon dismissed the case for want of prosecution. Afterwards, on July 17th, 1953, plaintiff filed a motion to vacate the order of dismissal and on August 18, 1953, this motion was denied. Plaintiff requested the vacation of the order of June 16, denying the motion for continuance and dismissing the cause of action for want of prosecution. It reviewed the proceedings in regard to the setting of the case for trial and the motion for continuance and the dismissal of the cause. It further set out the facts in regard to the unavailability of Duker Counsel, William J. Decker and included certificates from the District Court of the County of St. Louis, Missouri, showing that the said attorney was engaged in a trial in that court on June 16, 1953. After the denial of this motion to vacate the order of June 16th, the plaintiff then appealed to this court.

Only one question is presented for decision, namely, whether or not the action of the trial court in refusing to grant continuance and dismissing for want of prosecution was error.

Section 103 of the Civil Practice Act provides as follows:

"Additional time may be granted on good cause shown, in the discretion of the court and on such terms as may be just, for the doing of any act or the taking of any step or proceeding prior to judgment in any civil action."

"The circumstances, terms and conditions under which continuances may be granted, the time and manner in which application therefor shall be made, and the effect thereof, shall be according to rules."

Both parties in this cause concede that the matter of the granting or refusal of a continuance rests within the sound discretion of the trial court. However, the exercise of this discretion must be exercised judiciously and not arbitrarily or capriciously, and if the facts show that the court refused the continuance arbitrarily or capriciously, such act will justify a reversal. The motion for a continuance sets up broad grounds for the continuance. The plaintiff, by her affidavit, shows as grounds for continuance that she had gone to visit a daughter who was expecting a child; that complications arose in the birth of the child, and that her presence was necessary; that she exercised all due diligence in trying to get back for the trial and that she did not have a chance to confer with her attorneys concerning other and additional witnesses and other testimony, and that these other and additional witnesses and other testimony were essential to the fair and proper presentation of the plaintiff's side of the case; that such witnesses were not available for subpoena at that time. It is true that details of what these new witnesses would testify were not incorporated in the affidavit. Yet, the other facts were such, that unless an urgency prevailed, should have been sufficient for the granting of a reasonable continuance.

The facts in the case of Adcock v. Adcock, 339 Ill. App. 543, are somewhat parallel to the facts in this case. In that case the

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The facts in the case of Adcock v. Adcock, 157 Ill. App. 342, are somewhat parallel to the facts in this case. In that case the

plaintiff's attorney was engaged in the trial of another cause. He advised the presiding judge to that effect and the presiding judge stated that he would only grant a continuance with the consent of the defendant's counsel. In that case the plaintiff's attorney filed a formal motion for continuance verified by an affidavit setting forth the circumstances. The motion for continuance was denied and the court granted defendant's motion to dismiss for want of prosecution. In that case the Appellate Court said: "While courts are cognizant that continuances may be sought merely to delay the administration of justice, they have zealously guarded the right of a party to a day in court with counsel and a jury trial, where it has been conscientiously sought. ***"

In another part of the opinion in Adcock vs. Adcock, (Supra), the court quoted from In re Estate of Weiss vs. Berkovitz, 282 Ill. App. 502, as follows: "We are fully aware that many times excuses are offered to the court that are without merit, but in the instant case the absent attorney was actually engaged in a trial in another courtroom, and really wanted to try the case. We are of the opinion that it would be a nearer approximation of justice if the court would have so arranged his call that the lawyer for the estate could present his defense and be heard at a subsequent time."

In this case it would seem that the plaintiff presented meritorius grounds for continuance. Her attendance at her daughter's side while her grandchild was born was important to her and the complications in the birth of the child presented necessary and valid reasons for the delay in the preparation of her case. One of her attorneys was

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In another part of the opinion of Illinois ex. rel. Lowry, the court stated from In re Thomas ex rel. Thomas, 281 Ill. 199, 207, as follows: "We are only aware that long time rules are adopted to the court that are without merit. In the instant case the chosen attorney was actually engaged in a trial in another courtroom, and really wished to try the case. To say if the motion that is sought to a matter appropriation of justice if the court could have so arranged his call that the lawyer for the appellant could present his defense and be heard on a subsequent time."

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engaged in other cases and was not available. While it is true that where a party has more than one lawyer, the absence of one is not necessarily a ground for continuance, yet it would seem that with the additional reasons, namely, her daughter's confinement and the fact that she was some 2,000 miles away when the case was set and the time for trial was within a few days, should be sufficient grounds to warrant the court in granting a reasonable continuance. While the trial judge is to be commended for the prompt and expeditious disposal of cases before him, yet, at the same time the rights of the litigant to have sufficient time to prepare her case and to have her day in court, must be preserved.

Each case must rest upon its own facts and while this court is reluctant to substitute its judgment for that of the trial court, yet under the circumstances it appears that the trial court committed manifest error and abused its discretion in denying the motions for continuance and dismissing plaintiff's cause of action and denying the motion to vacate the order dismissing the cause.

It is therefore our judgment that the judgment of the Circuit Court should be reversed and remanded with instructions to reinstitute plaintiff's complaint and set the cause for hearing in due course.

Judgment reversed and remanded
with directions.

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Gen. No. 10735 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT

- - -

13 I.A. 2d 203

February Term, A. D. 1954

HAZEL I. ALLINGTON, Plaintiff-Appellant, vs. CITY OF FREEPORT, a Municipal Corporation, Defendant-Appellee.	Appeal from the Circuit Court of Stephenson County.

Dove, J.

Hazel I. Allington brought this suit in the Circuit Court of Stephenson County seeking to recover damages from the City of Freeport for injuries which she alleged she sustained when she fell while walking on South Galena Avenue in the business district of Freeport. The issues made by the pleadings were submitted to a jury, resulting in a verdict and judgment in favor of the City, and the plaintiff appeals.

The evidence discloses that at the time of the accident plaintiff was 51 years of age, 5 feet 10 1/2 or 11 inches tall, and weighed 180 pounds. She and her husband operated a music store at 204 West Stephenson Street. South Galena Avenue runs north and south. An alley leads westerly from South Galena Avenue, and the first street south of this alley is West Main

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Street, and the first street north of this alley is West Stephenson Street. Between 11:30 and 11:45 o'clock on the morning of April 28, 1952, plaintiff was walking on the west side of South Galena Avenue, which is within the business district of the city, proceeding toward Stephenson Street, intending to go to her music store. There was no water standing on the streets or sidewalks, and the weather was clear, and the sun was shining. The building abutting the alley on the south edge of the alley facing South Galena Avenue was, at the time of the accident, occupied by the Sam Lee Laundry. The alley is 13 feet 9 inches in width. From West Main Street to West Stephenson Street, it is uniformly upgrade, and the elevation from the south edge of the alley to the north edge of the alley is 1 foot 4 3/4 inches.

When a pedestrian going north reaches the south edge of the alley, there is a step-down of several inches from the sidewalk level to the level of the alley, and on the north side of the alley the sidewalk projected over the top of the old curb; that due to breakage and erosion, the sidewalk had been broken back behind the top of the curb leaving an irregular, jagged edge extending eight feet and one inch east and west. The top of the old curb was 3 3/4 inches above the brick surface of the alley, and from the top of the old curb up to the sidewalk level was an additional 4 5/8 inches. Originally, before there was any breakage or disintegration of the cement, the step-up from the surface of the alley to the sidewalk level at the point where the accident occurred was 8 3/8 inches. The broken condition of the cement, however, made what some of the witnesses referred to as a double step.

On direct examination, the plaintiff testified as abstracted: "When I came to that Chinese laundry I looked to see if any cars were coming from the right into the alley then I looked to my left to see if any were coming out of the alley and then I stepped down, looking straight ahead and went across the alley raising the right foot first and tripped and fell with the left foot as I got up on the walk." On cross-examination, after testifying that her vision was good, perfect with glasses, she continued: "As I approached the alley there were no cars there. I didn't see anybody that I knew until I had fallen. There was nothing at all to distract my attention. After I stepped down into the alley, I looked to my right to see if anything was coming into the alley and to my left to see if anything was coming out of the alley. Then I walked across the alley and looked straight ahead. I looked right and left before I stepped down from the sidewalk into the alley proper. I immediately stepped down. Then I looked straight ahead up the sidewalk. I did not look at the sidewalk. I looked straight ahead. As I crossed the alleyway I didn't observe anything. I didn't see any bricks or a step-up or anything. I knew there was a sidewalk there." the witness was then asked: "Did you see it (the sidewalk)?" and she replied: "I told you before I was looking straight ahead. I was looking right on the level as I was walking. I was not aware of any broken part of the sidewalk."

The evidence further discloses that the plaintiff had walked along the west side of South Galena Street on this sidewalk on one other occasion when it was in the same condition as it was on the day of the accident; that for many years she had passed the scene of the accident twice each day in going to her work from her home in her automobile and in returning from the music

store to her home; that she knew there was an elevation on South Galena Street from West Main Street to West Stephenson Street, was familiar with the alley, knew the surrounding objects such as light poles and meter posts, and knew the Greyhound bus depot was located one door south of the laundry and that buses arrived at the court-yard by way of this alley, but she testified that upon the occasion in question she did not see the light pole or meter post as she proceeded north across the alley just before she fell. Several photographs of the street and alley were offered and admitted in evidence showing the step-up and disintegration of the cement, and plaintiff indicated thereon the place where she fell. The record also discloses that upon two prior occasions women had stubbed their toe or had tripped and fallen at the same place where plaintiff fell, and it further appears that the condition of the walk had been the same for two and one-half years prior to April 28, 1952.

It is first insisted by counsel for appellant that counsel for appellee improperly emphasized before the jury the fact that the city officials had never received any notice of any other accident occurring at this location. The record discloses that Louis Stiegman was called as a witness for the city. He testified that he had been an alderman of the city from 1935 to 1949, was chairman of the Street and Alley Committee of the City Council, and in June, 1949, became superintendent of streets. During the course of his examination, counsel for the city asked him this question: "During the time that you were in the council as chairman of the street, alley and bridge committee, did anybody ever make any complaint to you as to a defective condition of a sidewalk on South Galena Avenue right at the alley that

intersects midway between Stephenson Street and Main Street?" An objection to this question was sustained. Counsel for the city then asked the question: "After you became superintendent of streets in June, 1949, did anybody ever make any complaint to you about a defective condition of a sidewalk on South Galena Avenue at the alley midway between Stephenson Street and Main Street?" The witness answered: "No." Counsel for the plaintiff objected and asked that the answer be stricken, whereupon the court said: "Sustained. The answer may be stricken, and the jury will ignore the answer." Again while Roscoe Cook was on the witness stand, called by the city and had testified that he was the city engineer, he was then asked by counsel for the city: "Up until April 28, 1952, has there been any report of any accident on this sidewalk in question?" The court promptly sustained an objection to this question, and the witness made no answer.

Counsel insist that notwithstanding the court sustained objections to these questions and struck the only answer made, the jury had heard the answer which was prejudicial to the rights of the plaintiff and requires a reversal of this judgment. There is no merit in this contention. The record discloses that after the witness Stiegman had answered "No" to the question above set forth, the court very courteously requested the witness to "refrain from answering any further questions until the objection is completed and ruled upon." The record also shows that after this occurrence but outside of the presence of the jury, counsel for the plaintiff, in the presence of counsel for the city and the court, said: "This last witness blurted out a "No" and although it is incompetent, the jury heard it. I don't know how you will ever take it out of their minds. The court did its duty in admonishing

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the jury, but after it has been made it may or might have carried error." Whereupon the court said: "As to this alleged error, the witness answered the question "No." Is it your suggestion that a juror be withdrawn and the cause continued?" Whereupon, counsel for the plaintiff said: "No."

Furthermore, among the nineteen written instructions given by the court just before the jury retired to consider of its verdict was one which concluded: "The jury should entirely disregard any evidence which they have heard and which was afterward stricken out by the court." How any court could have done more to protect its record and to accord a litigant a fair trial based on competent evidence must be left to conjecture.

The other alleged error argued by counsel for appellant is the giving of the following instruction: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or that the person was negligently inattentive." Counsel for appellant state that this instruction has been given in automobile accident cases but insists that the evidence in this case upon the question of liability is practically undisputed; that it was vital that the jury be correctly and accurately instructed upon the question of contributory negligence, and that this instruction took from the jury the question of plaintiff's due care and left the jury with no alternative "but to find the plaintiff 'negligently inattentive' or in other words contributorily negligent."

mine

Counsel for appellee state that this instruction may have been inartfully worded but insist that the condition of this step was plainly visible to those travelling as plaintiff was on the morning in question, and counsel calls to our attention the oft-quoted sentence from the opinion in Dee v. City of Peru, 343 Ill. 36, (p.42), where it is said: "The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the danger when the view was unobstructed and where, if he had properly exercised his sight he would have seen it."

In the instant case, plaintiff insisted that her eyesight when corrected by glasses which she was wearing was nearly perfect; that as she proceeded north along the sidewalk and before she reached the alley she looked and saw no cars in the alley or no pedestrians; that there was nothing to distract her attention; that she was familiar with all the surroundings; that as she stepped down and her feet came in contact with the surface of the alley, she looked to her right and then to her left and proceeded across the alley and "looked straight ahead upon the sidewalk." Further on in her testimony she said she did not look at the sidewalk but looked straight ahead, did not look down and did not see the place where she stumbled and fell. This instruction was therefore based upon the evidence found in the record. Furthermore, the abstract prepared by counsel for appellant does not show at whose instance any of the instructions were given or that they constitute all the instructions given at the trial. None of the instructions were marked by the trial court either "given" or "refused" as required by the Practice Act. All that the abstract discloses is that after both sides had rested, arguments of counsel followed, and then under the words

"Given Instructions" appear nineteen instructions separated by asterisks. The eighth instruction, a portion only of which appellant complains, is a long instruction and, from its place in the abstract, we would be warranted in assuming that it was tendered by counsel for the plaintiff. As set forth in the abstract, this entire instruction is as follows, viz.:-

> "General human experience justifies the inference that when one looks in the direction of an object clearly visible he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight it follows that either there is an irreconcilable conflict in such evidence or that the person was negligently inattentive. The complaint alleges that the plaintiff was walking along the sidewalk on South Galena Avenue in the City of Freeport, on the west side of the street, at a point between Stephenson Street and West Main Street, on April 28, 1952; that said sidewalk at the time and place in question was under the control of the City of Freeport and lay within the corporate limits thereof, in a business section of the City of Freeport; that it was the duty of the city to keep the public sidewalk in question in a reasonably safe condition, so that persons walking along the sidewalk would not be injured; that the defendant did not regard its duty, but carelessly, wrongfully and negligently suffered and permitted the sidewalk at the place in question, where it adjoins the alleyway at the north edge of said alleyway, to become and remain in a broken and unsafe condition, and carelessly, wrongfully and negligently suffered and permitted said public sidewalk to have an elevation considerably higher than the surface of the alleyway immediately and adjacent thereto, so that it was unsafe and dangerous for the use of the plaintiff and any other persons walking along the sidewalk; that said condition existed for a considerable length of time prior to the date in question, and that the defendant had or should have had notice of that condition; that at the point of the accident, the alleyway is approximately 8 1/4 inches lower than the surface of the sidewalk lying immediately north of and adjacent thereto, and that the portion of the sidewalk which lies immediately next to and north of the alleyway, is badly broken, so that portions of the cement sidewalk project over portions of the sidewalk immediately underneath, along a jagged, irregular edge. The complaint further alleges that at the time and place in question, the plaintiff, while walking as a pedestrian, in a northerly direction, along said sidewalk and across the alleyway in question, was at all times in the exercise of due care for her own safety. The complaint further alleges that as a direct result of the careless, wrongful and negligent conduct of the City of Freeport in permitting the sidewalk to become and remain in an unsafe and dangerous condition,

as described, the plaintiff, while in the exercise of due care for her own safety, and as she stepped up from the alleyway to the sidewalk, caught her foot on the projecting portions of the sidewalk, so that she then and there stumbled and fell upon and against the cement sidewalk, striking her left knee, nose and face against the sidewalk. The complaint further alleges that as a direct proximate result of the wrongful and negligent conduct of the City of Freeport, plaintiff was severely and permanently injured, suffering a severe blow to her left leg and knee, resulting in traumatic arthritis in her left leg and knee, as well as certain other lacerations, bruises, contusions and injuries to various other parts of her body; that she has suffered great pain and will in the future suffer great pain as a result of said injuries; that she has in the past, and will in the future be obliged to spend large sums of money for the services of physicians and nurses, in endeavoring to be cured of said injury; that she has in the past, and will in the future, suffer a loss of earnings as a result of the disabilities described in said complaint. The complaint further alleges that on August 28, 1952, the plaintiff served a legal notice upon the proper officials of the City of Freeport, Illinois, as to the happening of said accident as required by the statutes of the State of Illinois. To the written complaint of plaintiff, the defendant filed its written answer, by which written answer the defendant, City of Freeport, denies each and all of the allegations above set forth in plaintiff's written complaint, except that said City of Freeport admits that proper legal notice as to the happening of the accident was served upon the proper officials of the City of Freeport, Illinois. And it is upon the issues joined by the written complaint of the plaintiff, and the answer of the defendant, that this cause has now come on for trial."

Under the facts in this case, we are clearly of the opinion that it was not reversible error to give the instruction complained of. Under the authorities, however, appellant is in no position to question its correctness. (Bingham v. Christensen, 348 Ill. App. 61, 66 et seq. and cases there cited).

The verdict in this case and the judgment rendered thereon are sustained by the evidence found in this record. The jury was fully and adequately instructed as to the applicable law. There is no merit in either of the errors appellant relies upon for reversal and, therefore, the judgment of the Circuit Court of Stephenson County must be affirmed.

Judgment affirmed.

Wolfe, J. concurs
Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Bernard
Mr. Walter Gardner, Esq., M.P. to the Committee of Privileges

4193A

Abstract

General No. 10718 Agenda No. 18

IN THE

APPELLATE COURT OF ILLINOIS | 3 2d I.A. 20

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SECOND DISTRICT

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October Term, A.D. 1953

ALFRED FARR, Plaintiff, Appellee, vs. CHICAGO and EASTERN ILLINOIS RAILROAD COMPANY, Defendant, Appellant.	Appeal from the Circuit Court of Kankakee, County.

Per Curiam:

Alfred Farr instituted this suit in the Circuit Court of Kankakee County against Chicago and Eastern Illinois Railroad Company seeking damages for personal injuries suffered by him when he was struck by the body of one Alice B. Buntain, who was hit by defendant's northbound passenger train Number Six.

The cause was submitted to the jury on counts two and four of the complaint, alleging negligence and wilful and wanton misconduct respectively. Issue was joined by the answer of the defendant in the nature of a general denial.

The jury returned a general verdict in favor of the plaintiff and against the defendant in the amount of $6,250.00. Judgment was entered thereon by the court. Defendant filed its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. These motions were by the court denied.

Appellee,

Appellant.

The principal grounds urged by the defendant for a reversal of the judgment are: (1) Count four of the complaint fails to state a cause of action for wilful and wanton infliction of injury. (2) The record does not sustain the charge of wilful and wanton misconduct on the part of the defendant. (3) Count four of the complaint is fatally defective because it does not allege that the plaintiff was free from contributory wilful and wanton misconduct. (4) Plaintiff failed to prove freedom from contributory wilful and wanton misconduct. (5) The court erred in denying defendant's motions for directed verdict and for judgment notwithstanding the verdict. (6) The court gave erroneous instructions on behalf of the plaintiff.

Count four alleges that the defendant "wilfully and wantonly with conscious indifference to surrounding circumstances did one or more of the following: "Ran its train through its depot at a reckless, excessive and dangerous rate of speed, to-wit: eighty miles per hour. Ran its train through its depot at a reckless, excessive and dangerous rate of speed, to-wit: eighty miles per hour at approximately the same time its passenger train Number Fourteen, also northbound, was due to stop at said depot. Ran its train through its depot at a reckless, excessive and dangerous rate of speed, to-wit: eighty miles per hour at approximately the same time its passenger train Number Fourteen, also northbound, was due to stop when a curve in its track made it impossible for its train Number Six at such high rate of speed to stop so as to avoid striking crossing pedestrians. Ran its train through its depot at a reckless, excessive and dangerous rate of speed, to-wit: eighty miles per hour at approximately the same time its passenger train

Number Fourteen, also northbound, was due to stop on the same track at said depot, without providing adequate warning to plaintiff and intended passengers of the approach of defendant's fast train Number Six. That by reason of the aforesaid conduct, acts and omissions of defendant and as a direct and proximate result thereof, plaintiff was struck as aforesaid."

Defendant did not file a motion to dismiss in the nature of a demurrer to this count of the complaint as provided for under Section 45 of the Civil Practice Act (Ill. Rev. Stat. Chap. 110, par. 169) but elected on the other hand to file an answer denying each and every allegation and in effect raising only the general issue.

At the close of plaintiff's evidence and again at the close of all of the evidence, defendant tendered a general motion for a directed verdict only. Defendant did not avail itself of Section 68 of the Civil Practice Act (Ill. Rev. Stat. Chap. 110, par. 192) and demand a separate verdict on the two counts.

After verdict and judgment, defendant filed its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and by that motion questioned the sufficiency of count four for the first time. No motion in arrest of judgment was offered on behalf of the defendant.

Alluding to appellant's first and third grounds for reversal, which question the sufficiency of count four of the complaint, it must be determined whether that count was properly challenged in the trial court and, if not, may it be assigned as error for the first time on appeal.

Appellant having not availed itself of Section 45 of the Civil Practice Act, supra, nor of a motion in arrest of Judgment, it is necessary to examine defendant's general motions for directed verdicts and its motion for judgment notwithstanding the verdict, or in the alternative its motion for a new trial.

A motion to direct a verdict, in order to reach particular counts must specify them, and a general motion directed against the entire complaint and containing no specification as to individual counts cannot be sustained as to any particular counts, even though there be no evidence to support such count. Fisher vs. Wittler, 285 Ill. App. 261.

In Farmer vs. The Alton Building and Loan Association, 294 Ill. App. 206, the Court said:

"Under the former practice it was held that a motion to exclude the evidence and for a directed verdict was not a proper method of questioning the legal sufficiency of the declaration as a pleading. Swift & Co. v. Rutkowski, 182 Ill. 18; Klofski v. Railroad Supply Co., 235 Ill. 146; Carson-Payson Co. v. Peoria Terrazzo Co., 288 Ill. App. 583, and there is nothing in said Section 68 or Rule 22 which extends or broadens the scope of inquiry in such a motion so as to reach a defect in the complaint.

Further the Court said: "Sub-paragraph 3, section 42 of the Civil Practice Act (Ill. Rev. Stat. 1937, Ch. 110, S166; Jones Ill. Stats. Ann. 104.042) provides, that all defects in pleading, either in form or substance, not objected to in the trial court, shall be deemed to be waived and since defendant did not file a motion in arrest of judgment and did not have a

sufficient motion to dismiss, all defects in the complaint either in form or substance are on this appeal deemed to have been waived."

In Swift & Co. vs. Rutkowski, 182 Ill. 18, the Court said: "If the defendant desired to question the sufficiency of the declaration it should have demurred, or moved in arrest of judgment. (Chicago. Burlington and Quincy Railroad Co. Vs. Harwood, 90 Ill. 425; Roberts vs. Corby, 86 id. 182)."

Appellant's motion for judgment notwithstanding the verdict has the same affect as a motion for a directed verdict, and raises the same questions. (Wells vs. Wise, 298 Ill. App. 252, Merlo vs. Public Service Co. of Northern Illinois, 381 Ill. 300, Christensen vs. Frankland, 324 Ill. App. 391.)

Defendant's alternate motion for new trial will not be granted on account of errors or defects in the pleadings. (Grand Pacific Hotel Co. vs. Pinkerton, 217 Ill. 61.)

We conclude, therefore, that defendant did not properly preserve its assignment of error dealing with the sufficiency of Count four of the complaint in the trial court.

Attention must now be directed to the proposition of whether or not appellant may question the sufficiency of the complaint for the first time on appeal.

In the recent case of Gustafson v. Consumers Sales Agency, Inc. 414 Ill. 235, Justice Bristow, in an exhaustive opinion, treated the subject matter of questioning the sufficiency of a complaint for the first time on appeal. The Supreme Court, in their opinion, made the distinction between a complaint containing an incomplete or otherwise insufficient statement of a good cause of action and a complaint which absolutely fails to state or indicate any ground of liability which the law will recognize

In the former case the sufficiency of a complaint may not be attacked for the first time on appeal and in the latter the sufficiency may be assigned as error. The court said that if a complaint "clearly states an established category of liability" it may not be questioned for the first time on appeal.

Applying the test announced in the Gustafson case, it is clear and we so hold, that count four states a good cause of action when first questioned on appeal. It may be deemed that appellant waived any objection to count four by failing to test its sufficiency in the trial court by a motion to dismiss or a motion in arrest of judgment.

Appellant urges that the record does not sustain the charge of wilful and wanton misconduct and that the defendant has not proven that he was free from contributory wilful and wanton misconduct.

There is virtually no dispute as to the facts. Plaintiff, for a year and one-half prior to June 13, 1951, had been under contract with the Government to carry mail between the Postoffices and defendant's station at Momence, Illinois. On June 13, 1951, he arrived at the station at about six-thirty in the morning, intending to get mail from train Number Fourteen which was due at the station about six fifty-one in the morning. He remained in the station with about twelve to fifteen others. He heard a train whistle and thereafter got up, left the station, got his mail cart and saw a train approaching from the south about a half to three-quarters of a mile away. Several of the others had proceeded across the track preparatory to boarding the train, which they assumed was Number Fourteen. Plaintiff and Mrs. Buntain were the last to cross the walk in front of the train, and

they were walking side by side. When plaintiff was about three-quarters of the way across, he ran the remainder of the way, pushing his cart ahead of him. As he started to turn around he was struck by the body of Mrs. Buntain, who had been hit by the train. He was thrown against his mail cart and suffered a broken leg.

It developed that the train was Number Six, a north-bound passenger which was due through Momence at five minutes before six o'clock A. M. daylight savings time, and was not scheduled to stop at Momence as did Number Fourteen. Plaintiff testified that no warning was given by the railroad that the oncoming train was not Number Fourteen. He also testified that he knew that there were no railway employees on duty to give such warning until after seven-thirty in the morning. Plaintiff knew that the train was coming but did not hear the whistle or the sounding of the horn after the first time. He testified that he assumed that it was the train due at that time, being Number Fourteen, and that he did not look down the track after he left the station.

Laura Jane Dolder testified for the plaintiff and said the train was going about seventy-miles per hour and that the train blew its whistle almost continuously from a half to three-quarters of a mile south of the station until the accident occurred and that from watching the train approach, she decided from its speed that it was not Number Fourteen.

Alonzo H. Williams, testifying for the plaintiff, said that in his opinion the train was travelling about eighty miles an hour, that the horn blew almost continuously from a point which was a half to three-quarters of a mile down the track until the time of the accident and that from observing the train he knew because

[illegible]

of its speed that it was not Number Fourteen.

The train crew testified that the whistle was blowing almost continuously going into the station and that the speed of the train was about eighty miles an hour, which was the usual speed through Momence. They further testified that at a point about a hundred and fifty feet from the cross walk that the train was thrown into an emergency stop and the distress signal was sounded.

Of the witnesses, plaintiff and one witness, Lambert, looked up the track initially but did not look again and testified that they did not realize that the approaching train was not Number Fourteen as expected.

Of the remaining witnesses, Dolder, Williams, Jenkins, Kershaw and Minton all testified that they watched the train approach and realized that it was not Number Fourteen before they got to the cross walk.

Plaintiff admitted that he heard the train whistle, and looked down the tracks and saw it coming when it was at least one-half mile away. He admitted that he intentionally, with knowledge of the approach of the train, crossed the tracks on which it was proceeding. From the time that he first saw the train until he was three-quarters of the way across the tracks he did not again look down the tracks and at that time noticed the train but noticed nothing particular about it. Arriving at a point four or five feet across the tracks, plaintiff stopped and started to turn, knowing that Mrs. Buntain was behind him.

He testified that he did not hear the horn other than when he first noticed the approach of the train. He testified that he made no attempt to see if the train was coming at a fast rate of speed. He further testified that he did not look down the

track at all after he started, even though the other train very often came late and even though he knew that he could not tell what train it was.

The evidence is uncontroverted that the whistle of the train was blowing almost continuously from the time it was one-half to three-quarters of a mile away until the occurrence.

To constitute an act of wilful and wanton misconduct, the party doing the act, or failing to act, must be conscious that his conduct would naturally and probably result in injury or intentionally disregard a known duty or display an absence of care for the life, person, or property of others such as exhibit a conscious indifference to consequences. (Bartolucci vs. Falleti, 382 Ill. 168; Trumbo vs. C.B. & Q. R.R. Co., 389 Ill. 213.)

In the instant case, defendant's train was travelling at its customary speed at the point of the accident, and its bell was ringing and its whistle blowing for at least three-quarters of a mile from the station. The train was thrown into an emergency stop and the distress signal was sounded at a point about a hundred and fifty feet from the cross walk when it first became apparent that persons were not heeding its previous warning. Plaintiff was aware of the speed that defendant's train Number Six passed through Momence and on occasion that train ran late.

Excessive speed alone of a railroad train does not constitute a sufficient basis for the charge of wilful and wanton negligence. (Trumbo vs. C. B. & Q. R. R. Co., 389 Ill. 213, and cases cited therein.) When defendant's employees have given all

of the usual and proper signs to warn persons of their approach, they are not, in the absence of circumstances indicating that such persons will not or cannot get out of danger, required to slacken speed or stop the train. (Morgan vs. The New York Central Railroad Company, 327 Ill. 339; Carrell vs. The New York Central Railroad Company, 384 Ill. 599.)

Viewing all of the evidence in the most favorable light for the plaintiff, together with all reasonable inferences arising therefrom, there is a lack of proof of wilful and wanton misconduct on the part of the defendant railroad.

We adopt the statement of the Supreme Court in the Trumbo case to the instant case when it was said: "There being no evidence to support the charge of wilful and wanton misconduct, it was incumbent upon the trial court, upon request, to withdraw the charge from the jury. Failure to do so constituted error requiring reversal of the judgment and a retrial of the cause, owing to the uncertainty what influence the charge, though not proved, may have had upon the jury. (Greene vs. Noonan, 372 Ill. 286.) The error is not of a harmless nature, because of the presumptions, where a general verdict is rendered, without specifying the count on which it is based, that the verdict is based upon a cause of action of which malice is the gist, rather than upon other counts in the same complaint charging merely ordinary negligence. Greene vs. Noonan, 372 Ill. 286; Buck vs. Alex, 350 Ill. 167; Jernberg vs. Mix, 199 Ill. 254."

Further, the evidence fails to disclose the presence of any unusual circumstances of a type calculated to confuse persons crossing the railroad tracks at defendant's depot. This fact is especially true in the case of the plaintiff, Farr, who,

for a period of at least a year and a half, had been making daily calls at defendant's station for the purpose of delivering and obtaining mail from defendant's trains and who knew that train Number Six did not stop at Momence, that it ran at a high rate of speed, and that it was often late. That defendant's conduct failed to disclose any unusual circumstances of a type calculated to confuse persons in the depot is further substantiated by the testimony of Williams, Dolder, Jenkins, Kershaw, and Minton, who all testified that they realized that the approaching train was not Number Fourteen even before they reached the cross walk to the east side of the defendant's station.

The record discloses that several of the persons on the depot platform were passengers, as defined in C. & E. I. R.R. Co. v. Jennings, 190 Ill. 478, and to them the defendant owed the highest degree of care. The plaintiff here was not a passenger but was struck by the body of a passenger which had been struck by that train. Even assuming that Mrs. Buntain, whose body struck the plaintiff, was guilty of negligence, her negligence would not excuse negligence on the part of the defendant, if the defendant was in fact guilty of negligence which was the efficient and proximate cause of the injury. (West Chicago St. R.R. Co. v. Tuerk, 90 Ill. App. 105; Chicago City Railway Company v. Shaw, 220 Ill. 532.)

The rule is that where the complaint consists both of counts based on negligence and upon counts based on wilful and wanton misconduct and the verdict is general, the presumption is that the verdict is based upon the counts charging wilful and

wanton misconduct. The counts of the instant complaint charging wilful and wanton misconduct of the defendant are not supported by the evidence found in this record. The failure of the trial court to withdraw these counts from the jury necessitates a reversal of the judgment and a remandment of cause for retrial. (Greene v. Noonan, 372 Ill. 286; Trumbo v. C.B. & Q. R. R. Co., 389 Ill. 213.)

Without expressing any opinion as to the weight of the evidence relative to the ordinary negligence charged, the judgment of the Circuit Court of Kankakee County, for failing to withdraw from the jury the willful and wanton counts of the complaint, is reversed, and this cause is remanded for a new trial.

Reversed and remanded.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Abstract

Gen. No. 10740 Agenda No. 12

3 I.A.2d 209

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1954

MARIE KESER, HELEN SMITH, JUANITA NICHOLSON AND RAYMOND NICHOLSON, a minor, by his Mother and next friend, Juanita Nicholson, Plaintiffs-Appellants, vs. ROBERT CORRIE, SR., Defendant-Appellee.	Appeal from the Circuit Court of La Salle County.

Per Curiam:

Appellants bring this appeal upon the record proper without a Report of Trial Proceedings. From this it appears a collision occurred between an automobile operated by Robert Corrie, Sr. and another car operated by Harry Smith. Thereafter, the passengers in the car owned and operated by Corrie brought their separate suit against Smith. A second suit was instituted by the passengers in Smith's car against Corrie. Prior to the trial, attorneys for Corrie, Appellee, made an oral motion to consolidate the case against him with the case against Smith. The record reflects this entire transaction as follows: "Now on this day come the parties hereto by their respective attorneys; whereupon the court having taken under advisement the motion of the defendant Corrie to consolidate this cause for trial with cause No. 48538, Mabel L. Corrie, et. al., etc., v. Harry Smith, and the court now being fully advised in the premises allows said motion.

Abstract

Dec. 19, 1920 — Number 12.

In the

SUPREME COURT OF APPEALS

SECOND DISTRICT.

CHARLESTON, W.VA., 1920.

MARY K. BEAR, SARAH BEAR, MARTHA NICHOLSON and FANNIE NICHOLSON, a minor, by her father and next friend, Jeanette Nicholson, Plaintiffs-in-error,	Appeal from the Circuit Court of Ritchie County.
vs.	
ROBERT CORRIE, Sr., Defendant-in-error.	

Per Curiam:

Appellants bring this appeal upon the record proper without a Report of Trial Proceedings. From this it appears a collision occurred between an automobile operated by Robert Corrie, Sr. and another car operated by Harry Smith. Thereafter, the passengers in one car owned and operated by Corrie brought their separate suit against Smith. A second suit was instituted by the passengers in Smith's car against Corrie. Prior to the trial, attorneys for Corrie, Appellee, made an oral motion to consolidate the case against him with the case against Smith. The record reflects this entire transaction as follows: "Now on this day come the parties hereto by their respective attorneys; whereupon the court having taken under advisement the motion of the defendant Corrie to consolidate this cause for trial with cause No. 4853, Label I. Corrie, et. al., plf., v. Harry Smith, and the court now being fully advised in the premises allows said motion.

"Thereupon it is ordered by the court that this cause be and the same is hereby consolidated with case No. 48538 and is hereby set for trial at the top of the trial list for May 18, A. D. 1953."

Trial by jury was had of the two cases so consolidated, resulting in substantial verdicts against Smith and in favor of Corrie's passengers and in a verdict of not guilty in favor of Corrie and against Smith's passengers. Motion for new trial was made and denied, and the several passengers in Smith's car appeal.

Paragraph 6 of the motion for new trial alleged error in the action of the trial court in consolidating the two cases, the theory being that the court, in so doing, prejudiced the action of appellants. The pertinent question we are first concerned with is whether the appellants saved the question for review. It is to be noted that the record does not indicate affirmatively that the appellants objected to the motion to consolidate. Appellants allege that they had informed the court at the time of the motion that the consolidation would be prejudicial and therefore was an abuse of discretion on the part of the trial court, all of which it is contended was fully and amply set forth in the motion for new trial. The gist of appellants' position is that they were prejudiced by the order of consolidation. Since we have no Report of Trial Proceedings, it is impossible to see whether or not timely objections to evidence, trial procedure and correlary motions to exlude were made, and, if made, whether the trial court ruled correctly thereon.

"Assignment of error must be on the record itself and not upon arguments of counsel or upon the fact that the question might have been raised in the pleadings or during

Thereupon it is ordered by the court that this cause be and the same is hereby consolidated with case No. 16930 and is hereby set for trial at the top of the trial list for May 18, A. D. 1923."

Trial by jury was had of the two cases so consolidated, resulting in substantial verdicts against Keith and in favor of Corrie's passengers and in a verdict of not guilty in favor of Corrie and against Keith's passengers. Motion for new trial was made and denied, and the several passengers in both cases appeal.

Paragraph 6 of the motion for new trial alleged error in the action of the trial court in consolidating the two cases, the theory being that the court, in so doing, prejudiced the action of appellants. The pertinent question we are first concerned with is whether the appellants saved the question for review. It is to be noted that the record does not indicate affirmatively that the appellants objected to the motion to consolidate. Appellants allege that they had informed the court at the time of the motion that the consolidation would be prejudicial and therefore was an abuse of discretion on the part of the trial court, all of which it is contended was fully and amply set forth in the motion for new trial. The plea of appellants' position is that they were prejudiced by the order of consolidation. Since we have no Report of Trial Proceedings, it is impossible to see whether or not timely objections to evidence, trial procedure and proper rulings to rulings were made, and, if made, whether the trial court ruled correctly thereon.

"Assignment of error must be on the record itself and not upon arguments of counsel or upon the fact that the question might have been raised in the pleadings or during"

the trial." Odin Coal Co. v. Industrial Commission, 297 Ill. 392.

"Upon appeal every reasonable intendment not negatived by the record will be indulged in support of the judgment. Error is never presumed by a reviewing court but must be affirmatively shown by the record." Union Drainage District No. 5 v. Hamilton, 390 Ill. 493.

Inasmuch as it does not appear affirmatively that the appellants objected to the motion to consolidate the two cases and because of the absence of the Report of Trial Proceedings, we cannot determine the question of prejudice. Since the alleged errors were not saved for review, it will not be necessary to consider the other questions raised upon this appeal.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Justice Anderson took no part in the consideration or decision of this case.

4227 A

Abstract

General No. 10754 Agenda No. 5

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1954

3 I.A. 2d 210

ZACK DEMPSEY, Plaintiff-Appellant vs. LUGENE PATTERSON, Defendant-Appellee	Appeal from the Circuit Court of Winnebago County

Dove, J.

Plaintiff, Zack Dempsey, appeals from a judgment of the Circuit Court of Winnebago County entered after that Court allowed Defendant Lugene Patterson's motion to dismiss plaintiff's suit. Dempsey's, complaint filed on August 4, 1953, alleged, among other things, that the defendant had forcibly and unlawfully assaulted him on the 19th day of November, 1952, at the plant of the National Lock Company in Rockford, Illinois, where both the men were employed.

As grounds for defendant's motion to dismiss the defendant alleged that he, Patterson, had previously sued the plaintiff, Dempsey, for assault and battery arising out of the same occurrence which was the subject matter of the present suit brought by plaintiff against the defendant. He also set up that in the prior suit Dempsey filed an answer in which he claimed self defense and in which he denied that he committed

General No. 10756 Agenda No. 3

In the

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1964

ZACK DEMPSEY, Plaintiff-appellant, vs. LUDEME PATTERSON, Defendant-appellee	Appeal from the Circuit Court of Winnebago County

Dove, J.

Plaintiff, Zack Dempsey, appeals from a judgment of the Circuit Court of Winnebago County entered after such Court allowed Defendant Ludeme Patterson's motion to dismiss plaintiff's suit. Dempsey's complaint filed on August 4, 1955, alleged, among other things, that the defendant had forcibly and unlawfully assaulted him on the 19th day of November, 1952, at the plant of the National Lock Company in Rockford, Illinois, where both the men were employed.

As grounds for defendant's motion to dismiss the defendant alleged that he, Patterson, had previously sued the plaintiff, Dempsey, for assault and battery arising out of the same occurrence which was the subject matter of the present suit brought by plaintiff against the defendant. He also set up that in the prior suit Dempsey filed an answer in which he claimed self-defense and in which he denied that he committed

an assault and battery on Patterson. The motion to dismiss also set forth that in the first suit the jury returned a verdict in favor of Patterson and against Dempsey for Twenty-five Hundred Dollars ($2500.00), and that the jury answered this special interrogatory, "Did the defendant, Zack Dempsey, commit a wanton and malicious assault and battery upon the plaintiff, Lugene Patterson?" in the affirmative. The motion to dismiss also set up that the matters alleged by Dempsey in his present suit are the same matters as were involved in the previous suit which Patterson brought against Dempsey, and that the issues raised by the plaintiff in his present suit have already been adjudicated, and that plaintiff, Dempsey, is barred from prosecuting his present claim by the judgment entered by the Court on the verdict of the jury in the first suit and by the answer to the special interrogatory made by the jury in that suit.

In the affidavit of defendant filed in support of his motion to dismiss Patterson stated that the Zack Dempsey who is the plaintiff in the instant suit is the same person as the Zack Dempsey who was the defendant in the previous suit which Patterson brought against Dempsey and that in the previous suit Dempsey testified that he Dempsey struck Patterson only in self-defense: that the cause of action which he alleged against Dempsey in the first suit arose out of a striking and cutting of Patterson with a knife, by Dempsey on November 19, 1952 at the plant of the National Lock Company in Rockford, Illinois, where both men were employed, and that at no time, other than the time which is set out in the complaint in the first suit and the complaint in the instant suit, have Patterson and Dempsey hit each other and assaulted each other or committed a battery upon each other.

The affidavit of Paul N. Wilson was also filed in support of defendant's motion to dismiss. In this affidavit, Wilson states that he is Clerk of the Circuit Court of Winnebago County: that the records of his office show that a judgment was entered in

an assault and battery on Patterson. The motion to dismiss also set forth that in the first suit the jury returned a verdict in favor of Patterson and against Dempsey for Twenty-Five Hundred Dollars ($2500.00), and that the jury answered this special interrogatory, "Did the defendant, Zack Dempsey, commit a wanton and malicious assault and battery upon the plaintiff, Eugene Patterson?" in the affirmative. The motion to dismiss also set up that the matter alleged by Dempsey in his present suit are the same matters as were involved in the previous suit which Patterson brought against Dempsey, and that the issues raised by the plaintiff in his present suit have already been adjudicated, and that plaintiff, Dempsey, is barred from prosecuting his present claim by the judgment entered by the Court on the verdict of the jury in the first suit and by the answer to the special interrogatory made by the jury in that suit.

In the affidavit of defendant filed in support of his motion to dismiss Patterson stated that the Zack Dempsey who is the plaintiff in the instant suit is the same person as the Zack Dempsey who was the defendant in the previous suit which Patterson brought against Dempsey and that in the previous suit Dempsey testified that he Dempsey struck Patterson only in self-defense: that the cause of action which he alleged against Dempsey in the first suit arose out of a striking and cutting of Patterson with a knife, by Dempsey on November 19, 1932, at the plant of the National Lock Company in Rockford, Illinois, where both men were employed, and that at no time, other than the which is set out in the complaint in the first suit and the complaint in the instant suit, have Patterson and Dempsey hit each other and assaulted each other or committed a battery upon each other.

The affidavit of Paul A. Wilson was also filed in support of defendant's motion to dismiss. In this affidavit, Wilson states that he is Clerk of the Circuit Court of Winnebago County: that the records of his office show that a judgment was entered in

the case of Patterson vs. Dempsey (the first suit between the parties hereto) on the verdict of the jury on June 22, 1953; that a motion for new trial was filed by the defendant Dempsey in the first suit on July 2, 1953, and that this motion for new trial was denied on July 17, 1953.

The record further discloses that plaintiff, Dempsey, filed a motion to strike the motion filed by Patterson to dismiss the complaint. The basis for plaintiff's motion to strike the motion to dismiss was that the subject matter of the present cause of action was not adjudicated in the prior suit, and that the motion to dismiss was insufficient in that it failed to allege that a final judgment was rendered on the merits in the first action by a Court of competent jurisdiction, and that it failed to allege that the judgment was still in full force and effect.

This appeal presents the question whether the suit which Patterson brought against Dempsey and in which the jury returned a verdict in favor of Patterson and against Dempsey for Twenty-Five hundred Dollars ($2500.00), and on which verdict the Court entered judgment in favor of Patterson and against Dempsey, is res judicata of the matters and things which Dempsey alleged against Patterson in his instant complaint. The record shows that in the first case the jury found that Dempsey did commit an assault and battery upon Patterson, and further, that Dempsey did not commit this assault and battery in self defense. By its answer to the special interrogatory submitted to it, the jury also found that Dempsey committed a wanton and malicious ~~assault~~ assault and battery upon Patterson. Defendant Patterson's motion to dismiss the present suit, and the affidavits filed in support of the same show that the parties to both suits are the same, that there was only one altercation between them, and that was the one which occurred on

the case of Patterson vs. Dempsey (the first suit between the parties hereto) on the verdict of the jury on June 20, 1883; that a motion for new trial was filed by the defendant Dempsey in the first suit on July 2, 1883, and that this motion for new trial was denied on July 17, 1883.

The record further discloses that plaintiff, Dempsey, filed a motion to strike the motion filed by Patterson to dismiss the complaint. The basis for plaintiff's motion to strike the motion to dismiss was that the subject matter of the present cause of action was not adjudicated in the prior suit, and that the motion to dismiss was insufficient in that it failed to allege that a final judgment was rendered on the merits in the first action by a court of competent jurisdiction, and that it failed to allege that the judgment was still in full force and effect.

This appeal presents the question whether the suit which Patterson brought against Dempsey and in which the jury returned a verdict in favor of Patterson and against Dempsey for Twenty-Five Hundred Dollars ($2500.00), and on which verdict the court entered judgment in favor of Patterson and against Dempsey, is res judicata of the matters and things which Dempsey alleged against Patterson in his instant counterclaim. The record shows that in the first case the jury found that Dempsey did commit an assault and battery upon Patterson, and further, that Dempsey did not commit this assault and battery in self defense. By its answer to the special interrogatory submitted to it, the jury also found that Dempsey committed a wanton and malicious assault and battery upon Patterson. Defendant Patterson's motion to dismiss the present suit, and the affidavits filed in support of the same show that the parties to both suits are the same, that there was only one altercation between them, and that was the one which occurred on

November 19, 1952, at the plant where they were employed in Rockford, Illinois, that the issues in the first case (wherein Patterson sued Dempsey) are the same as those sought to be raised in the second suit (wherein Dempsey sued Patterson), and that a final judgment was entered by the trial Court on the verdict of the jury which heard the first suit.

More than thirty days had expired between the date when the trial Court entered judgment in the first suit between these litigants and the time when the defendant filed his motion to dismiss in the second suit between them, and, therefore, the judgment in the first suit had become final. The fact that an appeal was later taken from that judgment does not alter the situation. We might add, however, that this court takes judicial notice of its own records which show that the judgment rendered by the Circuit Court of Winnebago County in the Case of Patterson v. Dempsey was affirmed by this Court on May 17, 1954 and a rehearing denied on June 3, 1954 (Patterson v. Dempsey, 2 Ill. App. 2d, 291, 119 N.E. 2d, 516).

In Harding vs. Harding, 352 Ill. 417 at 426-427 the Court, in discussing the application of the rule of res judicata, set forth the controlling principles as follows:

> "The doctrine of res judicata is, that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law. A judgment or decree so rendered is a complete bar to any subsequent action, on the same claim or cause of action, between the same parties or those in privity with them---The principle of res judicata applies, however, to cases where, although the cause of action is not the

November 19, 1926, at the place where they were employed in Woodford, Illinois, that the issues in the first case (Patterson Petroleum and Dempsey) are the same as those sought to be raised in the second suit (wherein Dempsey sued Patterson), and that a final judgment was entered by the trial court on the merits of the jury which heard the first suit.

More than thirty days had expired between the date when the trial Court entered judgment in the first suit between these litigants and the time when the defendant filed its motion to dismiss in the second suit between them, and, therefore, the judgment in the first suit had become final. The fact that an appeal was later taken from that judgment does not alter the situation. We might add, however, that this court takes judicial notice of its own records which show that judgment rendered by the Circuit Court of Winnebago County in the case of Patterson v. Dempsey was affirmed by this Court on May 17, 1928 and a rehearing denied on June 6, 1928 (Patterson v. Dempsey, 2 Ill. App. 2d, 431, 119 N.E. (2d), 312).

In Harding vs. Harding, 221 Ill. 417 at 422 the court, in discussing the application of the rule of res judicata, set forth the controlling principles as follows:

> "The doctrine of res judicata is, that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law. A judgment or decree so rendered is a complete bar to any subsequent action, between the same parties or those in privity with them---the principle of res judicata applies, however, to cases where, although the cause of action is not the

same, some fact or question has been determined and adjudicated in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties. In such cases, the determination in the former suit of the fact or question, if properly presented and relied on, will be held conclusive on the parties in the later suit, regardless of the identity of the cause of action, or the lack of it, in the two suits . . . Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in the case, the fundamental principle upon which it is allowed is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated in a court of competent jurisdiction shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication."

There is also involved in this appeal another aspect of the doctrine of res judicata and that is the estoppel by verdict rule. Since the jury answered "yes" to the special interrogatory inquiring of it whether the assault and battery committed by Dempsey upon Patterson was wanton and malicious, this verdict is conclusive between these parties in any other suit brought by either of them against the other wherein the answer to the special interrogatory submitted to the jury is controlling, as is the situation here. Clearly, Dempsey can not recover for an assault and battery alleged to have been committed upon him by Patterson if he (Dempsey) was guilty of a wanton and malicious assault and battery upon Patterson, as the jury found that he was. In Voss Truck Lines, Incl vs. Pike, 350 Ill. App. 528, the Court announced the applicable rule of estoppel by verdict: (p. 535)

same, some fact or question has been determined and adjudicated in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties. In such case, the determination in the former suit of the fact or question, if properly presented and relied on, will be held conclusive on the parties in the later suit, regardless of the identity of the cause of action, or the lack of it, in the two suits . . .

Whether the adjudication relied on as estopped goes to a single question or all the questions involved in the case, the fundamental principle upon which it is allowed is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated in a court of competent jurisdiction shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same question or question arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication."

There is also involved in this appeal another aspect of the doctrine of res judicata and that is the estoppel by verdict rule. Since the jury answered "yes" to the special interrogatory inquiring of it whether the assault and battery committed by Dempsey upon Patterson was wanton and malicious, this verdict is conclusive between these parties in any other suit brought by either of them against the other wherein the answer to the special interrogatory submitted to the jury is controlling, as is the situation here. Clearly, Dempsey can not recover for an assault and battery alleged to have been committed upon him by Patterson if Mr (Dempsey) was guilty of a wanton and malicious assault and battery upon Patterson, as the jury found that he was. In Ross Trucks Lights, Inc. vs. Like, 150 Ill. App. 589, the Court announced the applicable rule of estoppel by verdict: (p. 592)

"The rule applied is a phase of the doctrine of res judicata, which is generally referred to as estoppel by verdict. It has been defined in People v. Louisville & N. R. Co., 350 Ill. 274, in this language: 'It is also the law that where a controlling fact or matter is in issue between the parties to a suit and is determined and decided by the judgment in such suit, and such fact or matter is again in issue between the same parties in a subsequent suit, the former adjudication, if properly presented and relied on, will be conclusive of the issue in the later suit, whether the cause of action is the same in both suits, or not, This is generally denominated estoppel by verdict. City of Chicago v. Partridge, 248 Ill. 442. That the rule rests upon sound reasoning is apparent. A party having had his day in court and full opportunity to sustain his position on the issues of fact involved, and having failed to do so, should not be permitted to have a second trial upon the same issues to be proven by the same evidence. Emery v. Fowler, 39 Me. 326."

In Chicago Title & Trust Co. vs. National Storage Co., 260 Ill. 485 at 493 the Court said:

"An estoppel by verdict is but another branch of the doctrine of res judicata, and it rests upon the same principle of law,- - that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent

The rule applies in a number of the doctrine of res judicata, which is generally referred to as estoppel by verdict. It has been defined in People ex rel. v. Donlevitz 2 A. D. 2d, 120 (1)

"A, [illegible] in this language: 'It is also the law that where a controlling fact or matter is in issue between the parties to a suit and is determined and decided by the judgment in such suit, and such fact or matter is again in issue between the same parties in a subsequent suit, the former adjudication, if properly presented and relied on, will be conclusive of the issue in the later suit, whether the cause of action is the same in both suits, or not. This is generally denominated estoppel by verdict. City of Chicago v. Robbins, 2 Wall. 418. [illegible] That the rule rests upon sound reasoning is apparent. A party having had his day in court and full opportunity to sustain his position on the issues of fact involved, and having failed to do so, should not be permitted to have a second trial upon the same issues to be proven by the same evidence. Emery v. Fowler, 39 Me. 326."

In Chicago Title & Trust Co. vs. National Fidelity Co., 320 Ill. 485 at 492 the Court said:

"An estoppel by verdict is but another branch of the doctrine of res judicata, and it rests upon the same principle of law,-- that is, that a matter once litigated between parties in a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same [illegible] parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent

with the finding upon that question. Hanna V. Read, 102 Ill. 596; Wright v. Griffey, 147 id. 496; Markley v. People, 171 id. 260; People v. Hill, 182 id. 425; People v. Chicago, Burlington and Quincy Railroad Co. 247 id. 340."

Our study of this record convinces us that there is in this case an identity of parties, an identity of subject matter, and an identity of causes of action between the present suit and the suit which the instant defendant previously brought against the instant plaintiff and in which the defendant in the instant case recovered a judgment as heretofore related. This being so, the defense of res judicata was available to the instant defendant and he quite properly invoked it by his motion to dismiss. Neither can we agree with the plaintiff that the defendant's motion to dismiss and the supporting affidavits are technically insufficient. It is our opinion that the defendant's motion adequately presented the defense of res judicata and that the trial court committed no error in dismissing the complaint of the plaintiff and entering judgment against him.

Judgment affirmed.

Wolfe, J., concurs.

Mr. Justice Anderson took no part in the consideration or decision of this case.

with the finding, see the opinion. Brown v. Board, 100 [illegible].
396; Wright v. Gainey, 187 U.S. 388; Bailey v. Mosby, 187 U.S.
168; Fowler v. Hill, 92 U.S. 118; Phoenix v. Chicago, Burlington
and Quincy Railroad Co. 247 U.S. [illegible].

One study of this record convinces us that there is in this case no identity of parties, no identity of subject matter, and no identity of issues or relation between the present suit and the suit which the instant defendant previously brought against the instant plaintiff and in which the defendant in the instant case secured a judgment as aforesaid. This being so, the defense of res judicata was available to the instant defendant and he quite properly invoked it by his motion to dismiss. Neither can we agree with the plaintiff that the defendant's motion to dismiss and the accompanying affidavits are remarkably insufficient. It is our opinion that the defendant's motion summarily presented the defense of res judicata and that the trial court committed no error in dismissing the complaint of the plaintiff and entering judgment against him.

Judgment affirmed.

Wolfe, J., concurs.

Mr. Justice Andersen took no part in the consideration or decision of this case.

Gen. No. 10723 Agenda No. 21

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

October Term, A.D. 1953

HELEN HEITZ, RUTH HEITZ, now Ruth Heitz Hopkins, and CHARLES HEITZ.	
CHARLES HEITZ,	Appeal from the
Plaintiff-Appellee,	Circuit Court of
vs.	LaSalle County.
ERNEST HERSHEWAY,	
Defendant-Appellant.	

Per Curiam:

In 1949 plaintiffs filed suit against defendant for damages arising out of a fire in the building in which they lived and which was owned and maintained by defendant. The claimed negligence of the defendant was improper maintenance of the electrical system of the building, as a result of which the fire occurred. The complaint consisted of six counts, the first two being filed on behalf of plaintiff Helen Heitz and claiming damages for personal injuries sustained by her, the second two being filed on behalf of Ruth Heitz Hopkins and claiming damages for personal injuries sustained by her, and the last two counts being filed on behalf of Charles Heitz and claiming damage for loss of consortium of his wife, hospital, doctor and miscellaneous expenditures made by him on behalf of

Abstract

[illegible]

[illegible]

the other two plaintiffs. Charles Heitz is the husband of Helen Heitz and the father of Ruth Heitz Hopkins who, at the time of the occurrence, was a minor and unmarried. The expenditures referred to were incurred in the care and treatment of Helen Heitz and Ruth Heitz Hopkins for the injuries received by them in the fire. Charles Heitz received no personal injuries and was not at home when the fire and consequent injuries occurred. The case was tried before a jury. Upon the trial, evidence was introduced by plaintiffs as to the cause of the fire, their conduct, and the resulting injuries to the first two named plaintiffs. Plaintiff Charles Heitz introduced evidence of the bills rendered to him for their care and treatment and the incurring of miscellaneous items of expense as a result of the fire which totaled $7634.70. At the time of the trial, payments had been made on some of the bills, and these bills were admitted in evidence, for the most part without objection. The damage instruction given to the jury on behalf of Helen Heitz limited her recovery to damages for her personal injuries. A separate damage instruction as to Ruth Heitz Hopkins was likewise so limited. The damage instruction given on behalf of Charles Heitz covered the bills incurred by him for healing and curing his wife and daughter, loss of services of his wife, and loss of consortium of his wife.

The case was submitted to the jury with four forms of verdict: a guilty verdict as to each plaintiff, and a single not guilty verdict. The court, in submitting the forms, had each form prepared on a yellow sheet and instructed the jury: "Now when you come to a final conclusion and have all arrived at a verdict or verdicts, whichever may be, select one or three

of these, whatever conclusion you come to and all twelve of you sign your names and return them into court." There was a stipulation for sealed verdicts, and the jury deliberated, sealed their verdicts, and returned the following day. Thereupon, in the presence of the jury, the envelope was opened, and a verdict in favor of Helen Heitz in the amount of $5000.00 was found signed by all twelve jurors, and a verdict in favor of Ruth Heitz Hopkins in the amount of $5000.00 was found signed by all twelve jurors. The other two forms were unsigned, and the one as to Charles Heitz was not filled in as to amount of damages. The verdicts were recorded and the jury discharged.

Judgments in favor of Helen Heitz and Ruth Heitz Hopkins were subsequently entered on these verdicts. Defendant then appealed to this court from the two judgments, and this court affirmed the judgments in Heitz v. Hersheway, 347 Ill. App. 571.

Following the affirmance of the judgments and their satisfaction in open court, plaintiff Charles Heitz, on April 17, 1953, filed a motion for summary judgment on the record in which he prayed for judgment in the sum of $7634.70 (the amount of the bills introduced by him on the trial), and supported the motion with affidavits. His affidavit sets up the proceedings on the trial, the situation that developed on the verdicts, the subsequent appeal and affirmance of his wife and daughter's judgments, and the payment in full subsequent to the trial of the bills introduced by him at the trial. Other affidavits substantiated the correctness of certain of the bills and their payment. Defendant filed a motion to strike plaintiff's motion for summary judgment on the record and set forth as grounds for

said motion: (1) That Sec. 57(1) of the Civil Practice Act does not apply to this type of action; (2) That the damages of plaintiff Charles Heitz had been denied by the answer of defendant and that defendant was entitled to a trial by jury as to this issue; and (3) That denial of a trial by jury of these issues is a denial of due process. This motion was supported by the affidavit of one of the attorneys for defendant in which he set forth in detail the allegations of each plaintiff in the complaint as to damages, the denial of these allegations by the answer, the proceedings at the former trial, a detailed itemization of the claimed bills of plaintiff Charles Heitz and concluded with the statement that defendant's demand for trial by jury had not been withdrawn or waived. The trial court denied defendant's motion to strike and granted leave to file certain affidavits. Following the granting of this leave the same affidavit that was attached to the motion to strike was filed whereupon the court entered judgment in favor of plaintiff Charles Heitz in the sum of $7634.70. This appeal seeks a review of the action of the trial court in entering this judgment.

The failure of the jury to sign and return a verdict as to the plaintiff Charles Heitz is the equivalent of "no verdict" as to said plaintiff, Roadruck vs. Schultz 333 Ill. App. 476. Plaintiff Charles Heitz was thereupon entitled to a re-trial of his cause of action as set forth in Counts 5 and 6 of the complaint. No motion for new trial or otherwise was necessary to obtain such a re-trial.

We find no authority either in Sec. 50 or 57 of the Civil Practice Act for the procedure which was subsequently followed. A similar procedure was held to be erroneous in Roadruck vs.

said motion: (1) That sec. 4721 of the Civil Procedure Code does not apply to this kind of action; (2) That the damages of plaintiff Charles Daly has been caused by the negligence of defendants and that defendants are entitled to a trial on the merits of this issue; and (3) That denial of a trial by jury of these issues is a denial of due process. This motion was supported by the affidavits of one of the attorneys for defendant in which he set forth in detail the circumstances of each discrepancy in the complaint as to damages, the denial of these allegations by the answer, the stipulation of the former trial, a detailed itemization of the claims made at plaintiff Charles Daly's and concluded with the statement that defendant's demand for trial by jury was not been withdrawn or waived. The trial court denied defendant's motion to strike and granted leave to file another affidavit. Following the granting of this leave the same affidavit that was tendered to the motion to strike was filed whereupon the court entered judgment in favor of plaintiff Charles Daly in the sum of $7000.00. This appeal seeks a review of the action of the trial court in entering that judgment.

The failure of the jury to sign and return a verdict as to the plaintiff Charles Daly is the equivalent of the verdict as to each plaintiff. Tomkins vs. Sonnis 327 Ill. App. 470. Plaintiff Charles Daly was thereupon entitled to a new trial of the cause of action as set forth in Count 1 and 2 of the complaint. No motion for new trial or otherwise was necessary to obtain such a re-trial.

We find no authority stated in Sec. 30 or 31 of the Civil Procedure Act for the procedure was substantially followed. A similar procedure was held to be proper in Hartman vs.

Schultz, supra. There were certain issues formed in Counts 5 and 7 and defendant's answer thereto which had not been adjudicated. As to these issues defendant was entitled to a jury trial.

Plaintiff contends that the judgments in favor of Helen Heitz and Ruth Heitz Hopkins are res adjudicata or operate as an estoppel by verdict on the issues (1) the negligence of defendant and (2) lack of contributory negligence on the part of Helen Heitz and Ruth Heitz Hopkins. There is merit in this contention.

The general rule is to the effect that a judgment for or against a wife or child is not res adjudicata in a subsequent suit by the husband or father to recover medical expenses, damages for loss of consortium and the like. Cases involving this question are collected in an annotation in 133 A.L.R. 181 supplemented in 23 A.L.R. 2nd 710. The majority of decisions follow the general rule. However there is respectable authority to the contrary among which is Brandbury vs. Humphrey 162 Ill. App. 434. These latter cases proceed on the theory that the husbands damages are consequential and therefore his cause of action is derivative from his wife. An examination of the decisions following the majority rule reveals that they involve two separate suits, one by the wife or child and a subsequent suit by the husband or father. The courts conclude that there is a lack of identity of parties under such a situation making the estoppel rules inapplicable. In Bradbury vs. Humphrey 162 Ill. App. 434, a minor by his father as next friend brought suit to recover for personal injuries as a result of defendant's negligence and recovered judgment. Subsequently the father

Schultz, supra. There were certain issues raised in Counts 6 and 7 and defendant's answer thereto which had not been adjudicated. As to those issues defendant was entitled to a jury trial.

Plaintiff contends that the judgments in favor of Helen Smith and Ruth Smith against the defendants or persons as an attorney by verdict on the issues (1) the negligence of defendant and (2) lack of contributory negligence on the part of Helen Smith and Ruth Smith. Supra. Plaintiff is in this contention.

The general rule is in the United States a judgment for or against a wife or child in an action by a husband or a judgment in a suit by the husband or father to recover medical expenses, damages for loss of consortium and the like. Some jurisdictions this question are collected in an annotation in 42 A.L.R. 1231 supplemented in 53 A.L.R. 1344 (1). The majority of decisions follow the general rule. However there is considerable authority to the contrary among which is Wheatley v. Anderson 1923 1 Abp. 454. These latter cases proceed on the theory that husband has no consortium and therefore his cause of action is derivative from his wife. In consideration of the decisions following the majority rule reveals that they involve two separate suits, one by the wife or child and a subsequent suit by the husband or father. The courts conclude that there is a lack of identity of parties under such a situation making the estoppel rules inapplicable. In Wheatley vs. Anderson 1923 1 Ill. App. 454, a minor by his father as next friend brought suit to recover for personal injuries as a result of defendant's negligence and wanton and willful. Subsequently the father

brought suit in his own name to recover for medical expenses incurred and paid by the father. On the trial the father sought to introduce the judgment, in favor of his son, in evidence on the ground that it was res adjudicata of the defendant's negligence and want of contributory negligence of the son. The offer was refused by the trial court and in reversing the case the Appellate Court held that the judgment was competent evidence on these two issues; since although the parties were not the same in the two cases, the issues as to negligence of the defendant and the lack of contributory negligence of the son were the same.

The doctrine of estoppel by verdict is clearly set forth in Harding Company vs. Charles Harding 352 Ill. 417. Courts have been liberal in the application of this doctrine to the end that a matter, whether consisting of one or many questions, which has been adjudicated shall be deemed finally and conclusively settled and not subject to relitigation in subsequent litigation between the same parties where the same question or questions arise. One of the primary considerations in determining whether one is a party to the former suit is his right to take part in the conduct of the case in which the adjudication occurs. Since the advent of the Civil Practice Act multiple plaintiffs may join in an action for separate demands growing out of the same transaction. Such was done in this case, and all issues were tried at the same trial. Plaintiff therefore had a right to, in part at least, control the proceedings, examine witnesses, introduce evidence and the like. The issues of negligence of defendant and lack of contributory negligence of the wife and daughter were common to all parties. The record at hand affords a favorable background against which the application of estoppel by verdict should be applied. The defendant has had his day in court and full opportunity to sustain his

brought suit in his own name to recover for personal injuries incurred and paid by his father. In the trial the trial court ruled that the judgment, in favor of the son, in evidence on the ground that it was res adjudicata of the defendant's negligence and not of contributory negligence of the son. The after was reversed by the trial court and in reversing the same the appellate court held that the judgment not constituted evidence on these two issues; these although the parties were not the same in the two cases, the issues of negligence of the defendant and the lack of contributory negligence of the sub-rogee the same.

The doctrine of mutuality is thereby in force in Hawaii Company vs. Lorenzo decided 3rd Jul. 1. Courts have been liberal in the application of such doctrine to the end that a mutual adjustment of the rights of the parties, without unnecessary and expensive trials and the taking of testimony in different jurisdiction between the same parties where the question or question arise. One of the primary considerations in determining whether the in a party to the former suit is the right to have part in the decision of the case in order to adjudicate a question. Since the amount of the first trial is multiple plaintiffs may join in an action for separate damages growing out of the same transaction. Each was done in this case, and all issues were tried in the same suit. Plaintiff Shore-Line had a right to, in fact to trial, consent the proceeding, admits evidence, introduce evidence and so like. The issues of negligence of defendant and lack of contributory negligence of the wife and daughter were issues in all trials. The record at bar affirms a favorable determination upon the application of estoppel by verdict should be sustained. The defendant has had his day in court and full opportunity to justify the

position on the issues of fact involved and having failed to do so, should not be permitted to have a second trial upon the same issues to be proven by the same evidence. Furthermore defendant does not seriously contend that he is entitled to relitigate the two issues heretofore stated.

Counsel for defendant contend that the judgment in favor of Helen Heitz and Ruth Heitz Hopkins are presumed to include the amount of medical expenses for services rendered eadh of them and point to certain allegations in each of the first four counts of the complaint. Notwithstanding any allegations in these counts of the complaint, their causes of action, when submitted to the jury, were, by the instructions, limited to damages for their respective personal injuries and any claims for medical expenses were excluded as to them. Under these circumstances the jury could not include any medical expenses in their verdicts and contrary to counsel's contention the presumption exists that the jury followed the courts instructions in this regard.

Upon a retrial of the Charles Heitz counts the issues of the negligence of defendant and the lack of contributory negligence of the wife and daughter should be deemed to be now finally settled leaving only the questions of the lack of contributory negligence of Charles Heitz and the amount of his damages.

The judgment of the Circuit Court is reversed and the cause remanded with directions to proceed in accordance with the views expressed in this opinion.

Reversed and remanded with directions.

Mr. Justice Anderson
took no part in the
consideration or
decision of this case.

condition on the liquor of Joan involved had causing fatal is so so, should not be permitted to have a second trial upon the same issues to be proved by the same witnesses. Furthermore defendant does not seriously contend that he is entitled to mitigate the two latter contributory crimes.

Counsel for defendant contends that the judgment in favor of Dalas Zaitz and Dora Zaitz should not be reversed to include the amount of medical treatment the original complaint each of them had to receive allegations in each of the first four counts of the complaint. Nevertheless any allegations in these counts of the complaint, which stated or notice, were contained in the jury, only by the instructions limited to damages for their respective personal injuries and any claims for medical expenses were excluded to them. Under these circumstances the jury could not interpose for medical expenses in their verdicts and according to counsel's contention the prosecution which the jury followed the proper instructions in this regard.

Upon a retrial of the Dorothy Zaitz counts the issues of the negligence of defendant and the fact of contributory negligence of the wife and daughter should be drawn to be more fully serious jurors with the questions of the law of contributory negligence of Charles Zaitz and the amount of his damage.

The judgment of the Dorothy Zaitz is reversed and the cause remanded with instructions to proceed in accordance with the views expressed in this opinion.

Reversed and remanded with directions.

Mr. Justice Dobson
took no part in the
consideration or
decision of this case.

4233 A

Abstract

Gen. No. 10736 Agenda No. 1.

IN THE 3 I.A.2d 222

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

FEBRUARY TERM, A. D. 1954.

RAY DAVIES, and DOROTHY DAVIES, Plaintiffs-Appellants, vs. CARSTENSEN FREIGHT LINES, INC., an Illinois Corporation, and FRANCIS SHIPPEE, Defendants-Appellees.	Appeal from the Circuit Court of Rock Island County, Illinois.

WOLFE,-- J.

Dorothy Davies was driving the automobile belonging to her husband, Ray Davies on the International Bridge which connects the cities of Rock Island, Illinois, and Davenport, Iowa. There were three ladies riding with Mrs. Davies. Following them was Francis Shippee driving a truck belonging to the Carstensen Freight Lines, Incorporated. The pavement on the bridge was wet and slippery. This bridge is a toll bridge and as Mrs. Davies approached the tollhouse, she slowed down or stopped, and the Carstensen truck skidded into the back of her automobile damaging the car and injuring Mrs. Davies.

Ray Davies and Dorothy Davies started a suit in the

Circuit Court of Rock Island County, Illinois, against the Carstensen Freight Lines, Inc., and Francis Shippee claiming that through their negligence, the truck driver hit and damaged the Davies' car and Mrs. Davies was injured.

The suit was tried before a jury in Rock Island County, that found the issues in favor of the defendant. The plaintiffs entered a motion for judgment notwithstanding the verdict, and also for a new trial. Both motions were overruled by the Court. Judgment was entered on the verdict in favor of the defendants and against the plaintiffs for costs. It is from this judgment that the plaintiffs have perfected an appeal to this Court.

The only question raised on this appeal is one of fact, and that is whether the judgment is against the manifest weight of the evidence. No complaint was made about the jury being improperly instructed, or that any other error occurred in the trial of the case.

It is the contention of the appellants that where Mrs. Davies was approaching the tollhouse on the bridge, there is a slight grade upward, and that as she was slowing down to pay the toll, the defendants' truck crashed into the rear of the car she was driving, damaging the trunk and severely injuring her. It was admitted by the appellees that there was a slight grade where the collision occurred; that the pavement was wet and slippery, but it was contended by them that Mrs. Davies suddenly stopped her car, and that the driver put on the brakes of the truck and locked the wheels;

that he did everything he could to avoid the collision, but the truck slid on the wet pavement about forty feet when it crashed into the back of the plaintiffs' automobile.

Mrs. Davies and two of the ladies that were in the car with her at the time of the collision, testified that Mrs. Davies had not stopped her car, but was slowing it down at the time the collision occurred. On cross-examination two of the witnesses admitted that shortly after the accident, they had signed a statement in which they said that Mrs. Davies had stopped the car at the time of the collision.

At the hearing of the case the jurors and the trial judge have a better opportunity to judge the evidence than a Court of review. They can see the witnesses and can observe their manner while testifying. In this case the twelve jurors and the trial judge, after hearing the evidence and seeing the witnesses testify, have come to the conclusion that the plaintiffs have not proven their case by a preponderance of the evidence. Unless this Court can say that the verdict of the jury is against the manifest weight of the evidence, the judgment should stand. It is the province of the jury to weigh the evidence, and under the instructions of the Court, to decide questions of fact. After reading the evidence in the case, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence, and the judgment should be affirmed.

Affirmed.

Dove, J., concurs.

Anderson, J., took no part in the consideration of this case.

Dove, J., concurs.

Anderson, J., took no part in the consideration of this case.

4243

A

Abstract

Gen. No. 10753 Agenda No. 4.

IN THE 3 I.A.2d 222

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

MAY TERM, A. D. 1954.

JESSE KUNTZELMAN, Appellant, vs. NORMAN RESH, Appellee.	Appeal from the Circuit Court of Winnebago County, Illinois.

WOLFE,-- J.

Jesse Kuntzelman lived in the Town of Winnebago and on the morning of December 2, 1952, went to a farm East of Winnebago to feed some steers. After doing his chores he started back towards his home driving his automobile on what is commonly known as Cunningham Road. This is a blacktop pavement about sixteen feet wide with shoulders on each side. About seven o'clock A.M. he met a car that was being driven by Norman Resh and the two cars collided and Kuntzelman was injured and his automobile damaged. He started a suit in the Circuit Court of Winnebago County, against Norman Resh for damages which he claimed he sustained through the negligence of Norman Resh at the time of the accident. The case was submitted to a jury who found the

issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the Court and judgment entered on the verdict in favor of the defendant. The plaintiff has perfected an appeal to this Court to reverse that judgment.

It is claimed by the appellant that he saw the defendant's car approaching about a block and a half away, or approximately six hundred feet west of him; that the plaintiff himself was driving west and the Resh car was being driven east on the north, or wrong side of the pavement; that he could see that the Resh car's windshield was totally covered with frost, so much so, that he could not see the people in the car; that the Resh car proceeded down the road toward him on the wrong side of the road until it was within sixty feet of him; that at that time he turned his car sharply to the left, or to the south side of the pavement to avoid having a head-on collision with the defendant, and at the same time the defendant turned his car to the right to avoid a collision, and that the cars collided and the plaintiff was injured.

The defendant was riding in his car accompanied by his sister. They both testified that before they started they went out to the car and the windshield was covered with frost; that the sister got into the car, started the engine and turned on the defroster; that Norman Resh took a scraper and scraped off all the frost on the windshield; that after that he got into the car and into the driver's seat and drove

issues in favor of the defendant. The plaintiff moved a motion for a new trial, which was overruled by the court and judgment entered on the verdict in favor of the defendant. The plaintiff has perfected an appeal to this court to reverse that judgment.

It is claimed by the appellant that he was on the Lakeshore Drive approaching about 3 blocks and a half away, or approximately six hundred feet west of Clay; that the plaintiff himself was driving west and the last 300 was being driven east on the north, or wrong side of the pavement; that in order for both the back seats windshield was totally covered with frost, so much so, that he could not see the people in the car; that the cars were proceeded down the road toward him on the wrong side of the road until it was within plenty less of 100 feet at that time he turned his car sharply to his left, or to the south side of the pavement to avoid having a head-on collision with the defendant, and at the same time the defendant turned his car to the right to avoid a collision, and that the cars collided and the plaintiff was injured.

The defendant was riding in his car accompanied by his sister. They both testified that before they started they went out to the car and his windshield was covered with frost; that his sister got into the car, started the engine and turned on the defroster; that Thomas took a scraper and scraped off all the frost on the windshield; that after that he got into the car and into the driver's seat and drove

a mile or two on the road before the collision occurred; that at no time was the windshield of the defendant's automobile covered with frost and ice, so that he could not see the pavement on which he was driving; that at no time was he driving on the north, or wrong side of the highway; that while the road was covered with snow and ice, the edge of the pavement was clearly visible, because there was grass on the shoulder and he was driving his car close to the edge of this grass.

The plaintiff testified that he could not turn his car to the right and go off on the shoulder, because there were trees within two feet of the edge of the pavement and a ditch there, or creek on the north side of these trees. On being shown photographs of the road in question, he admitted that there would be between five and six feet between the trees and the pavement.

The plaintiff does not contend that the verdict of the jury is against the manifest weight of the evidence. His complaint is before this Court, that the trial court erred in refusing to give his tendered Instructions No. 4 and 6, and in giving too many instructions on behalf of the defendant. Courts have frequently criticized the giving of too many instructions, either for the plaintiff or the defendant. In the present case the Court gave eleven instructions for the defendant. Some of them could be given for either the plaintiff or the defendant. We do not think that the Court abused his discretion in giving that number of the instructions for the defendant.

a mile or two on the road before the collision occurred; that at no time was the automobile of the defendant operated with the driver and the, so that he could not see the movement of which he was driving; that at no time was he driving on the north, or wrong side of the highway; that while the road was covered with snow and ice, the edge of the pavement was clearly visible, because there was space on the shoulder and he was driving one wheel on the edge of this space.

The plaintiff testified that he could not turn his car to the right and off of the shoulder, because there were trees within ten feet of the edge of the pavement and a ditch there, or trees on the north side of those trees. On being shown photographs of the road in question, he admitted that there would be sufficient room for his car between the trees and the pavement.

The plaintiff does not contend that the conduct of the jury in arriving at material weight of the evidence. His complaint is before this court, that the trial court erred in refusing to give his requested instructions No. 1 and 3, and in giving the same instructions on behalf of the defendant. These have frequently criticized the giving of too many instructions, either for the plaintiff or the defendant. In the present case the court gave eleven instructions for the defendant. None of them could be given for either the plaintiff or the defendant. We do not think that the court abused its discretion in giving such number of the instructions for the defendant.

Plaintiff's refused Instruction No. 4 is as follows: "If you believe, from the evidence in this case, that immediately prior to the collision in question plaintiff was driving in a westerly direction on the northerly half of the paved portion of Cunningham Road, and that a car was then and there driven by the defendant in an easterly direction on the north half of the paved portion of Cunningham Road, and if you further find from the evidence that it was reasonably apparent to plaintiff that a collision was imminent; and if you further find that said plaintiff, when thus confronted with impending danger of collision--if you find from the evidence he was so confronted--turned to the left and into, or partly into, the south half of the paved portion of said highway, and in so doing said plaintiff did what an ordinarily prudent man would have done under similar circumstances, then you are instructed that plaintiff was not guilty of contributory negligence in having turned left into, or partly into, said south half of the paved portion of said highway. (Refused)." This instruction in effect, directs a verdict and should contain every element then necessary that would entitle plaintiff to a recovery. It omits something essential in the first part of the instruction which should read, "from a preponderance of the evidence in this case," not merely, "from the evidence." Another necessary element is omitted, that is, that a person cannot blindly or recklessly drive into a place of danger and then claim that he was confronted with impending danger of a

Plaintiff's requested instruction No. 4 is as follows:

"If you believe, from the evidence in this case, that immediately prior to the collision in question, plaintiff was driving in a westerly direction on the northerly half of the paved portion of Dunsmuir road, and that a car came and then was driven by the defendant in an easterly direction on the southerly half of the paved portion of Dunsmuir road, and if you further find from the evidence that it was reasonably apparent to plaintiff that a collision was imminent, and if you further find that said plaintiff, upon being confronted with imminent danger of collision--if you find from the evidence in the case so confronted--turned to the right and left, or remain upon the half of the paved portion of said highway, and in so doing said plaintiff did what is ordinarily reasonable and would have done under similar circumstances, then you are instructed that plaintiff was not guilty of contributory negligence in having turned left into, or partly into, said southerly half of the paved portion of said highway. (Underscoring." This instruction in effect, directs a verdict and would convince every element than necessary that would entitle plaintiff to a recovery. It omits everything mentioned in the first part of the instruction which should read, "from a preponderance of the evidence in this case," and merely, "from the evidence," another necessary element is omitted, that is, that a person cannot blindly or recklessly drive from a place of safety and then claim that he was confronted with imminent danger of a

collision. He must show that he was using ordinary and reasonable care for his own safety before he got into this perilous condition.

In the case of Edwards vs. The Hill-Thomas Lime and Cement Co., 378 Ill. at Page 180, it is there stated: "Instruction No. 1, given on behalf of appellee, is as follows: 'As to the issue of contributory negligence on the part of plaintiff, if any, you are instructed that plaintiff was not required to exercise the highest degree of care for his own safety, as the law required of him but to exercise ordinary care by which is meant that degree of care and caution which a reasonably careful and prudent person would have exercised under the same or like circumstances, and in the situation in which plaintiff was placed as shown by the evidence.' It will be noted that this instruction on the subject of contributory negligence tells the jury, in effect, that all the law required of the appellee was that degree of care and caution which a reasonably careful and prudent person would have exercised, 'in the situation in which' appellee was placed. The instruction entirely ignores the question of whether the appellee was guilty of contributory negligence in placing himself in that situation. Similar instructions have been repeatedly condemned by this court. In the case of North Chicago Street Railroad Co. v. Cossar, 203 Ill. 608, an instruction was given which, in substance, was the same as the above instruction. This court, in commenting upon the instruction, made the following

collision. In such cases that is one being reckoned are reasonable care for his own safety before is you into this perilous condition.

In the case of Ibbotson v. The Hill-Tavern Mine and Tunnel Co., 170 Ill. at page 488, it is stated that: "Ex-ercising the, given or behalf of appellee, is as follows: As to the issue of contributory negligence on the part of plaintiff, if any, you are instructed that plaintiff was not required to exercise the highest degree of care for his own safety, as the law required of him but to exercise ordinary care by which is meant that degree of care and caution which a reasonably careful and prudent person would have exercised under the same or like circumstances, and in the situation in which plaintiff was placed as shown by the evidence." It will be noted that this instruction on the subject of contributory negligence calls the jury, in effect, that all the law required of the appellee was that degree of care and caution which a reasonably careful and prudent person would have exercised, in the situation in which appellee was placed. The instructor entirely ignores the question of whether the appellee was guilty of contributory negligence in placing himself in that situation. Similar instructions have been repeatedly condemned by this court. In the case of North Chicago Street Railroad vs. v. Dewey, 203 Ill. 499, an instruction was given which, in substance, was the same as the above instruction. This court, in commenting upon the instruction, made the following

observations: 'The criticism made upon this instruction is, that it assumes that an ordinarily prudent and cautious person might find himself in the situation that plaintiff was in at the time of the accident, and assumes that she was not guilty of contributory negligence in being in the position in which she found herself at the time of the injury. In personal injury cases it has been repeatedly held by this court that it is improper to give an instruction which limits the question of due care to the conduct of the plaintiff at the time of the injury, regardless of his conduct in placing himself in the place of danger. * * * We think this instruction subject to the criticism made, and that the jury might well have inferred therefrom that if the plaintiff was in the exercise of due care at the instant when the accident occurred, then she might recover, although the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision.'" We think that Instruction No. 4 was properly refused by the Court.

Instruction No. 6 is as follows: "The Court instructs the jury that if you find, from a preponderance of the evidence in this case, that the defendant negligently drove his automobile in an easterly direction in the west-bound lane of traffic, and if you further find that such negligence placed said plaintiff, Jesse Kuntzelman, in a position of imminent peril of injury to himself, then you are instructed

observations: "The evidence here shows instruction 14, that it assumes that an ordinarily prudent and intelligent person might find himself in the situation that plaintiff was in at the time of the accident, and assumes that the use of prima of contributory negligence is valid in the condition in which she found herself at the time of the injury. In numerous injury cases it has been unanimously held by this court that it is improper to give an instruction which limits the presumption of due care to the conduct of the plaintiff at the time of the injury, regardless of the conduct in placing herself in the place of danger. - - - By which this instruction subject to the criticism made, and that the jury might well have inferred therefrom that if the plaintiff was in the exercise of due care at the instant when the accident occurred, then she might recover, although the evidence showed her was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision." We think that Instruction No. 9 was properly refused by the court.

Instruction No. 6 is as follows: "The Court instructs the jury that if you find, from a preponderance of the evidence in this case, that the defendant negligently caused his automobile to be suddenly driven in the west-bound lane of traffic, and if you further find that such negligence placed said plaintiff, Jessie Bontkoski, in a position of imminent peril of injury to herself, then you are instructed

that said plaintiff, when faced with such imminent peril, if any, was not required to use the same degree of self-possession, coolness and judgment as would be required to act as an ordinarily prudent person would have acted under similar circumstances."

The same criticism that we have directed as to Instruction No. 4 is applicable to No. 6 in that it omits the essential element of the plaintiff using due and ordinary care, not to put himself in the position of peril or danger. The last part of the instruction is erroneous, because it says that the plaintiff, under such circumstances, would not be required to act with the same coolness and judgment, as would be required of an 'ordinary prudent person' under similar circumstances. He should be required to act as an ordinary person under similar circumstances would act. Instruction No. 6 is also subject to criticism as assuming a disputed fact in the case. Rigotti vs. Bailey, 348 Ill. App. 597.

It is our conclusion that the trial court properly refused plaintiff's tendered Instruction No. 4 and 6, and the judgment is hereby affirmed.

Affirmed.

Dove. J., concurs.

Judge Anderson took no part in this case.

that said plaintiff, when found with good behavior possibly, if any, was not required to use the same degree of exhibitions, conduct and demeanor as would be required to act as an ordinarily prudent person would have acted under similar circumstances.'

The same criticism that we have discussed as to Instruction No. 4 is applicable to No. 7 in that it omits the essential element of the plaintiff being the ordinary care, not to put himself in the position of peril or danger. The last part of the instruction is erroneous, because it says that the plaintiff, under such circumstances, would not be required to act with the same diligence and judgment, as would be required of an ordinary prudent person under similar circumstances. It should be required to act as an ordinary person under similar circumstances would act. Instruction No. 8 is also subject to criticism as assuming a disputed fact in the case. Kimmell vs. Railway, 104 Ill. App. 59.

It is our conclusion that the trial court properly refused plaintiff's requested Instructions No. 4 and 6, and the judgment is hereby affirmed.

Affirmed.

Dove, J., concurs.

Mudge, absent, took no part in this case.

154 A

3 I.A.2d 254

46137

LEONARD ASHBACH CO., a corporation, Plaintiff - Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
LEAR, INCORPORATED, a corporation, Defendant - Appellant.	)	COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover commissions claimed by plaintiff upon sales of defendant's products. Verdict and judgment were for plaintiff in the amount of $66,989.55. Defendant has appealed.

Plaintiff in 1947 was in the business of selling and distributing radio and kindred devices. Leonard Ashbach was its principal officer. In 1947 defendant was engaged in the manufacturing of radios and similar equipment for peacetime and military use. It had three divisions, one of which was the Home Radio Division. Its plant was in Grand Rapids, Michigan.

Plaintiff's original complaint consisted of a count charging an express oral agreement on July 5, 1947 to sell defendant's products at a 5% commission and a quantum meruit count. Recovery sought under the counts was based respectively on sales of $2,000,000 and services worth $100,000. Defendant denied any agreement of any kind for commissions or services. It alleged offering plaintiff $4,000 to compromise a claim for commissions arising from a sale of more than $250,000 of defendant's products to the

Vim Company of New York; that plaintiff agreed to accept the compromise before defendant accepted the Vim order; and that after the order was accepted, plaintiff disavowed the compromise.

After judgment plaintiff amended its complaint to conform to the proofs. It alleged oral agreements on June 28, and July 5, 1947, by which plaintiff was given the exclusive sales, distribution and inventory liquidation agency at 5% commission. It also alleged a quantum meruit cause for services between June 28, 1947 and about May 1, 1948. It finally alleged an oral agreement made August 16, 1947 by defendant to pay plaintiff an amount equivalent to 5% commission for services rendered by plaintiff after June 28, 1947. Defendant answered, after denial of its motion to strike, again denying any agreement and again alleging the affirmative matter respecting the Vim Company order.

Defendant complains of prejudicial error in the court's admission of testimony of plaintiff's witnesses, Damsky and Siegel.

In opening argument, plaintiff's attorney outlined to the jury that the testimony of Damsky and Siegel would support plaintiff's theory in respect of defendant's need to sell, of defendant's benefit through the transaction with plaintiff and of the value of plaintiff's services.

Siegel and Damsky testified that Crane, Vice President in charge of the Home Radio Division, told Siegel he would like to "get rid of everything we have in stock;"

that subsequently, early in July, 1947, Damsky and Siegel inspected the inventory and offered $900,000; that the following day Crane, Lear, President, and Raemer, Executive Vice President, met with Siegel and Damsky and made a counteroffer to sell for $1,100,000, saying he was happy to get out of home radios when "they needed the money badly;" that Lear told them defendant had to meet an R. F. C. note of $750,000 and had no means to meet it; that Damsky and Siegel made arrangements to sell $250,000 of the inventory to Vim Company in attempting to get Vim to supply the $1,100,000; that Vim thought because defendant was "behind in its payments" and owed R. F. C., the money would be "in jeopardy;" that the deal did not go through; that the usual and customary commission on a sale of that kind in 1947 was 5%; and that under distressed circumstances, where selling expense is on the salesman, the rate should be about 10%.

Defendant objected repeatedly that the testimony of Siegel and Damsky was incompetent and immaterial, tending to corroborate nothing in the case because Siegel and Damsky were plaintiff's first witnesses. The court admitted the testimony subject to the objections, promising to strike what was not later connected up. Defendant's attorney stated that "to even extricate the improper evidence" not connected up would be an "absolutely impossible thing." Defendant's attorney did not cross-examine and at the close of Siegel's and Damsky's testimony, moved to strike "all this testimony to which objection is made."

We think the court ruled properly, first because the testimony tended to prove motive for defendant making the alleged contract and its extent; authority of Crane, Lear and Golde; and the value of plaintiff's services. The separation of the relevant from the irrelevant, prejudicial from the non-prejudicial, was not an impossible task and the motion to strike all was not proper and was properly denied. Graham v. Dressen, 292 Ill. App. 15; Balfour v. Dohrn Transfer Co., 328 Ill. App. 163.

Defendant contends there is no proof of any agreement alleged.

Since plaintiff alleged both an express contract and an implied contract, if there is evidence to support either, the verdict can be sustained. Velsicol Corp. v. Hyman, 338 Ill. App. 52, 56. On the question raised by defendant's motion to take the case from the jury, we take the evidence favorable to plaintiff as true and draw legal inferences most strongly in its favor. We do not consider contrary, or contradictory evidence, nor draw inferences adverse to plaintiff. No point is raised with respect to the weight of evidence. Consequently, telegrams or other writings, not favorable to plaintiff, have been disregarded. This would be true also of inconsistencies in plaintiff's pleadings had they been put in evidence.

There was testimony that during 1947 defendant made several loans resulting in mortgages of assets; that as of June 30, 1947 a balance of $188,000 was due on an equipment

purchase with about $44,000 due in 1947; that a balance of $750,000 on a $1,000,000 R. F. C. loan, was payable $83,333 per month; that a blanket assignment of accounts receivable covered the R. F. C. loan; that officers had waived salaries and offered to take reductions; and that from January to June, defendant had lost over $600,000 and "needed money."

The evidence shows that plaintiff and its predecessors were in business for more than 30 years; that Leonard Ashbach, its President, Treasurer and Sales Manager had been selling radios and electrical equipment for about the same period; that in early 1947 the home radio industry was in a depressed state; and that defendant's Home Radio Division was affected.

The testimony of Damsky and Siegel is that defendant's President and Crane had discussed with them at its Grand Rapids plant a sale of its entire Home Radio inventory; that defendant's attorney, Golde, who had final approval, insisted on $1,100,000 cash; and that the prospective purchasers could not raise the cash from Vim because it had learned defendant was not paying its bills.

There was introduced in evidence a resolution adopted by defendant's Board, when the bulk sale idea was abandoned, authorizing a sale of the inventory to one or more accounts on such conditions as the "President...shall ... approve."

There was evidence that Crane invited Leonard

Ashbach to Grand Rapids on June 28, 1947 to go over the Home Radio inventory; that defendant had not renewed its distribution agreements which expired in December, 1946 and all were to be cancelled in July, 1947; that Crane said the "stuff"had to be moved in a hurry and set up plans for Ashbach to have "the entire inventory"; that Crane told Ashbach 5% commission was satisfactory; and that Crane told President Lear of the arrangement with Ashbach for the exclusive sale at 5% commission and Lear shook hands with Ashbach, "wished him luck" and said Crane would give him the "final go ahead" at the show in Chicago.

There was also evidence that Ashbach pursuant to Crane's direction, set up the Lear exhibit at the Furniture Show; that Crane told him he was to have the national sales agency; that Ashbach met with Golde and Crane about July 5th at the show and was told that he would have no competitors and would get 5% commission; and that on August 10th, Crane asked Ashbach to wait until 1948 for his commissions.

Plaintiff's witnesses testified that Ashbach had about 175 customers in the Chicago area and at least one in every large city; that he brought Crane to meetings of various furniture buying syndicates representing thousands of retail radio stores; that he set up a Lear display in a Goldblatt store; that he influenced prospects to buy Lear products; that Goldblatts bought $48,000 Lear products; that one syndicate placed an order for more than $100,000; that another person bought about $89,000; that the opening inventory

in defendant's Home Radio Division in January, 1947 was about $1,207,000 and the closing inventory was about $95,000; that the total sales for 1947 in that Division were $3,126,852, of which about $1,000,000 was sold before July 5th; that defendant's earned surplus rose from $224,000 in June to $493,000 in December, 1947; and that Crane said Ashbach's efforts were surprising "all over the Nation."

They also testified that plaintiff spent $21,000 in promoting sales of defendant's merchandise; that distributors' complaints were referred to Ashbach by Crane; that Crane sent him to Los Angeles to resolve Company difficulties; that Ashbach entertained distributors and spoke to sales forces in Los Angeles and Denver; that Crane sent him photographs of samples in New York; that Ashbach helped Lear customers during the show with advertising layouts and entertained prospective buyers; and that Crane told a buyer Ashbach had oversold Lear merchandise and the buyer bought more at a higher price.

There was testimony that the fair, reasonable and customary compensation for services rendered by plaintiff was 5%.

We conclude that the foregoing testimony is competent and sufficient prima facie for plaintiff's recovery under the amended complaint. The testimony with respect to defendant's distressed financial condition and the expenses incurred and paid by Ashbach in promoting sales of defendant's products is competent as corroborative of plaintiff's theory that defendant needed plaintiff's services and knowingly accepted

them and the benefit of the money Ashbach spent. The testimony recited tends to prove an implied contract which negatives any presumption that plaintiff's services were gratuitously performed. Moreen v. Estate of Carlson, 365 Ill. 482; Anderson v. Biesman & Carrick Co., 287 Ill. App. 507; Floyd v. Estate of Smith, 320 Ill. App. 171. This is enough without considering the question of the alleged express contracts. Anderson v. Biesman & Carrick Co.

There is evidence of services rendered by plaintiff at the request of defendant, through or with approval of duly authorized officers, and there is proof of expenses incurred in defendant's behalf. We think that evidence is sufficient as a basis upon which the jury could estimate with reasonable certainty what was due plaintiff. Barnett v. Caldwell Furniture Co., 277 Ill. 286; Moore v. Schoen, 313 Ill. App. 367. Because of the proof in this record, the cases of Goldberg v. Hamburger, 342 Ill. App. 444; Schillinger Bros. v. Thompson-Starrett Co., 171 Ill. App. 319; and Johnson v. Peterson, 166 Ill. App. 404, are not applicable.

We think the court properly gave leave to plaintiff to file its amended complaint to conform to the proofs, because there was evidence to which the amended pleading could conform and it was based on the same transaction as the original complaint.

We are asked to reverse the judgment for error in instructing the jury. Instruction #1 stated the theory of plaintiff and stated the law respecting the alternative

grounds of express and implied contract. We see no objection in its failure to state defendant's theory and no merit to other criticisms levelled at the instructions. Defendant's theory was given in its instruction. Instruction #2 should not have used the term "find purchasers" but the error is not serious. We see no cause to complain of Instruction #3. Instruction #5 would be improved by substituting a clearer term for "all together" but we see no harm to defendant. Instruction #6 would be clearer and more helpful if more specific with reference to what plaintiff requested. The term "to take steps necessary to secure customers" describes some services and if no customers were secured as a result of the services, the jury presumably would limit compensation accordingly. Instruction #7 applied to all witnesses and we see no harm in it, though it too could be clearer. We see no objection to Instruction #8 or #9.

We think that any error in the instructions cannot be said on this record to have prejudiced defendant.

The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

155 A

3 I.A.2d 255

46238

GENEVIEVE L. KING, Plaintiff - Appellee, v. ROBERT C. KING, Defendant - Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action with decree in favor of plaintiff, awarding her a divorce, custody and support of the minor child and attorney's fees. Defendant husband has appealed.

The parties were married on November 29, 1947, had one child, who was four and a half years old at the time of trial, and separated July 21, 1951. Plaintiff was a professional vocalist earning five to six thousand dollars per year during the marriage. Defendant was unemployed most of the time and earned only one thousand dollars during the marriage.

The issues made on the pleadings were whether defendant was guilty of cruelty on March 2, and July 22, 1951, and whether plaintiff condoned the conduct by reconciliation. The decree found defendant guilty of cruelty and, though it made no specific finding upon the condonation issue, we presume from the order dissolving the marriage that the chancellor found the cruelty had not been condoned.

Defendant admits one act of physical violence upon the plaintiff. Plaintiff's testimony of a second act is corroborated by a third person who saw the bruise. This is

prima facie sufficient to support the decree. Whether plaintiff provoked the second act of cruelty; whether her witnesses were credible; or what effect their not seeing the actual act of inflicting the bruises had on their testimony were questions for the chancellor. His findings will not be disturbed unless they are against the manifest weight of evidence. Cohn v. Cohn, 327 Ill. App. 22. We are of the opinion that the finding with respect to the second act of cruelty is not against the manifest weight of evidence.

The evidence is undisputed that some time after July 22, 1951, plaintiff returned to the residence of the defendant. Defendant contends that, under the circumstances of this case, the conduct of the plaintiff in returning to his residence constituted condonation as a matter of law, and that the chancellor erred in failing to dismiss the suit when these circumstances appeared.

Condonation is an affirmative defense; the burden of proving it is upon the party who relies upon it. Rasgaitis v. Rasgaitis, 347 Ill. App. 477, 481. The chancellor found impliedly that the defense of condonation was not established. The question is, therefor, whether the chancellor was justified in finding that the defense of condonation was not established, taking the evidence most favorable to the plaintiff. This evidence is that, in addition to the specific acts of cruelty, there were frequently recurring arguments arising from defendant's unemployment; that these were in the presence of the child "upset" her

and "she was becoming nervous;" that after the last act of cruelty she returned to live with him for a week to see if they could not get along; that she did not have sexual intercourse with him; and that it "became impossible again and I left."

Condonation consists of the forgiveness by the wronged party "upon condition that the injury shall not be repeated", and the continuation or renewal of the conjugal relation. Teal v. Teal, 324 Ill. 207, 220. Cohabitation is merely evidence of condonation; its essential element is the intention of the wronged party to forgive. Teal v. Teal. And while it is true, as appellant argues, that intention can be established only by acts or words, it is equally true that the acts or words relied upon, to warrant reversal of the trial court on a question of fact, must be inconsistent with any reasonable explanation other than the intention to forgive. The chancellor could, on the evidence and inferences favorable to plaintiff, find that plaintiff returned, not intending to forgive, but to decide whether she would forgive.

The mere fact that the plaintiff occupied the same household as her husband, by and of itself, is insufficient to establish condonation as a matter of law. Rasgaitis v. Rasgaitis, 347 Ill. App. 477. The case of Ollman v. Ollman, 396 Ill. 176, is not applicable. In that case there was an actual reconciliation during which the parties lived together for a long period of time "as husband and wife" (page 184). The question in the instant case was one of fact for the chancellor.

For the reasons given the judgment is affirmed.

AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

46328

ESTATE OF PANOLA GARY, Deceased, Appellant,	APPEAL FROM
v.	CIRCUIT COURT
J. ERNEST WILKINS, SR., Appellee.	COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a citation proceeding to discover assets [Ch. 3, Par. 335, Ill. Rev. Stat. (1953)]. The Probate Court dismissed the citation. After a trial de novo on appeal to the Circuit Court, the court found respondent Wilkins had no goods, effects or assets belonging to the Estate of Panola Gary, and ordered the citation dismissed. The Executor of the Estate has appealed.

Lulu Day Rose died intestate. She left surviving her husband, her brothers, Ashberry and Lloyd Rice, and her sisters, Maggie Rice Haggard and Panola Gary. At her death she owned two pieces of improved real estate in Chicago, Illinois, one at 5922 Calumet Avenue and one at 4327 Calumet Avenue. On April 9, 1951 Panola Gary executed a deed to respondent Wilkins. She died on June 6, 1951. Two days later, on June 8th, Wilkins recorded the deed. On November 29, 1951 Wilkins sold the property and distributed the proceeds, together with some rents, to the Estate of Panola Gary, the sister and two brothers.

At the trial the following facts were not controverted: The sisters and brothers of Lulu Day Rose agreed to quitclaim their interests in the property at 5922 Calumet Avenue to the husband of Lulu Day Rose in consideration of his quitclaiming to them his interest in the property at 4327 Calumet Avenue and the payment of some cash; that this agreement was carried out; that thereafter the brothers and sisters decided to sell the property then owned by them and divide the proceeds of sale; that to facilitate the sale the brothers and sister of Panola Gary quitclaimed their interests to her; that she then deeded the property to Wilkins for purpose of sale; and that he sold the property and subsequently distributed the proceeds to the brothers, Ashberry and Lloyd Rice, to Maggie Rice Haggard and to the estate of Panola Gary, together with accumulated rents.

The facts support the finding of the Circuit Court. There is no evidence that Panola Gary was the sole equitable and legal owner when she deeded the property to Wilkins. The evidence shows she was the equitable owner of only a fourth interest and the property itself was subject to the equitable interests of her brothers and sister. Arguments invoking the doctrine of equitable conversion do not apply to charge Wilkins with the proceeds of sale as of the date of death of Panola Gary, so as to entitle the estate of Panola Gary to the full proceeds of the sale and compel her brothers and sister to claim through the estate. The

rights of the brothers and sister were rights in the property itself, such as would have entitled them to compel a reconveyance, prior to sale, as was done in the case of Fox v. Fox, 250 Ill. 384. Since their rights inhered in the property, there was no necessity for them to claim through the Estate of Panola Gary. Furthermore, according to the uncontroverted evidence, the Estate and the brothers and sister have received what was due from their attorney, Wilkins.

Argument which is directed at the low sale price of the property is not relevant in this proceeding under the evidence. We presume the trial court scrutinized Wilkin's testimony.

We think the Court made the only finding that could reasonably be made, and properly dismissed the citation. The order is accordingly affirmed.

ORDER AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

157 A

46303

3 I.A. 2d 256

HARRY L. TAYLOR, Appellant, v. ROBERT J. RIES, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of defendant entered upon the verdict of a jury in an action to recover damages for personal injuries sustained by the plaintiff when he was struck by defendant's automobile at or near the intersection of two streets. Plaintiff's motion for a new trial was overruled.

The accident occurred about three o'clock in the morning on February 27, 1950 near the intersection of Sheridan Road and Dakin Street in the City of Chicago. Sheridan Road, which runs in a general north-south direction, is intersected by Dakin Street at an approximate right angle.

Plaintiff's testimony tends to prove that he walked north along the east side of Sheridan Road to the south crosswalk of Dakin Street where he stopped at the curb and looked both ways for vehicular traffic on Sheridan Road. Observing no traffic he then proceeded west across Sheridan Road within the crosswalk. When the plaintiff reached a point about three feet east of the center of the road he saw the headlights of a southbound automobile about a block or more away. When he was about ten feet from the west curb of Sheridan

Road he saw defendant's automobile about fifteen feet away. Plaintiff testified he was struck when he was about eight or ten feet from the west curb of Sheridan Road in the south crosswalk of Dakin Street.

According to defendant's version the point of collision was about eighty-five or ninety feet south of the crosswalk of Dakin Street. After the impact plaintiff was found lying six or eight feet east of the west curb of Sheridan Road and south of the crosswalk. At the time of the occurrence there were no other automobiles or pedestrians on Sheridan Road in the vicinity of Dakin Street. Defendant admitted that he did not sound his horn before the collision, nor does his evidence show that he slowed down or stopped at the intersection. Defendant testified that when he got to about the middle of the block between Dakin and Byron Street, which is the first street south of Dakin, the plaintiff "just seemed to appear * * * out of the sky or any place."

Plaintiff does not contend that the manifest weight of the evidence supports his version of the occurrence but insists that under either plaintiff's or defendant's version of the case the jury should have been properly instructed where as here there was a sharp conflict in the evidence. (Price v. Chicago Transit Authority, 351 Ill. App. 376; Zelinski v. Chicago and North Western Ry. Co., 336 Ill. App. 49.)

Plaintiff complains of defendant's given instruction number 25 which reads: "You are instructed that the plaintiff was in duty bound to exercise ordinary care and caution

to look out for the approach of defendant's automobile and to avoid being struck by it as the defendant was to look out for and avoid striking him. One was not held in law to any higher degree than the other."

If, as defendant contends, the plaintiff walked across Sheridan Road eighty-five or ninety feet south of the crosswalk on Dakin Street, he was required to exercise greater caution in using the street at a point away from the crosswalk than at the crosswalk. (Morrison v. Flowers, 308 Ill. 189; Ledford v. Reardon, 303 Ill. App. 300). On the other hand, if the plaintiff crossed Sheridan Road at the crosswalk, the defendant was required to yield the right-of-way to plaintiff "by slowing down or stopping if need be to so yield" in accordance with Section 171 of Chapter 95-1/2, Illinois Revised Statutes 1949, State Bar Edition. Whether the jury believed plaintiff's or defendant's version of the occurrence we think, in either event, the instruction was misleading for the reason that the degree of care and caution required to be exercised by each of the parties was not equal. See Jones v. Stenderfer, 296 Ill. App. 145.

Plaintiff objects to defendant's instruction number 26 which reads: "The court instructs the jury that there was in full force and effect on January 27, 1950 the following statute, to-wit: 'Every pedestrian crossing at a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the road.'" In Breitmeier v. Sutera, 327 Ill. App. 221, we held a similar instruction

defective because of the omission of subparagraph "d" which qualifies the foregoing subparagraph "a" of Section 172, Chapter 95-1/2, by requiring every driver of a vehicle to exercise due care to avoid colliding with any pedestrian upon any roadway. In the recent case of Duffy v. Cortesi, 2 Ill. 2d 511, the court said: "It is recognized under common law doctrines that where the vision of the driver of an automobile is obstructed for any cause, ordinary care requires him to proceed with more caution than where he has unobstructed vision."

Criticism is also leveled at defendant's given instruction number 23 which directed attention to plaintiff's personal interest in the case but omitted any reference to defendant's. This instruction is defective and has been condemned in Gaffner v. Meier, 336 Ill. App. 44. Finally, plaintiff objects to five instructions given by defendant dealing with the subject of contributory negligence. We think these instructions placed undue emphasis on this question. (Gulich v. Ewing, 318 Ill. App. 506; Pillow v. Long, 299 Ill. App. 542.) Because of defendant's prejudicial instructions, we are impelled to reverse the judgment and remand the cause for a new trial.

For the reasons given, the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR NEW TRIAL.

FEINBERG, P.J. AND KILEY, J. CONCUR.

4263

Abstract

A

General No. 10752 | 3 I.A. 280 Agenda No. 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1954

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. KENNETH FINLEY, Plaintiff in Error.	Writ of Error to the Circuit Court of Du Page County.

Dove J.

The grand jury of DuPage County returned an indictment, consisting of four counts, against Kenneth Finley, plaintiff in error, hereinafter referred to as the defendant. Counts one and three of the indictment charged the defendant with rape and count two charged the defendant with an attempt to commit rape. Count four, upon which the court found the defendant guilty, charged that the defendant, on March 27, 1953, ravished and carnally knew Tura Pascual, which acts tended to render Tura Pascual, a female child fourteen years of age, a delinquent child and tended to render her guilty of indecent and lascivious conduct, she, the said Tura Pascual, not being the wife of said defendant.

The defendant entered a plea of not guilty and waived a trial by jury. The trial resulted in a finding that the defendant was guilty of contributing to the delinquency of a minor as charged in the fourth count of the indictment. Upon this finding a judgment was rendered sentencing the defendant to jail

General No. 10755 — 1 3 I.A.280 — Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1984

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. KENNETH FINLEY, Plaintiff in Error.	Writ of Error to the Circuit Court of De Kalb County.

Dove J.

The grand jury of DeKalb County returned an indictment, consisting of four counts, against Kenneth Finley, plaintiff in error, hereinafter referred to as the defendant. Counts one and three of the indictment charged the defendant with rape and count two charged the defendant with an attempt to commit rape. Count four, upon which the court found the defendant guilty, charged that the defendant, on March 27, 1983, revished and carnally knew Pete Doe, which said female to render Pete Doe, a female child under the age of 14, a delinquent child and tended to render her guilty of indecent and lascivious conduct, and, the said Pete Doe, not being the wife of said defendant.

The defendant entered a plea of not guilty and waived a trial by jury. The trial resulted in a finding that the defendant was guilty of contributing to the delinquency of a minor as charged in the fourth count of the indictment. Upon such finding a judgment was rendered sentencing the defendant to jail

for ninety days. The record is before us for review in return to a writ of error.

Upon the trial Hortense Pascual and Tura Pascual were the only ~~two~~ witnesses who testified on behalf of the People. Hortense testified that she lived at 2817 West Polk Street, Chicago; that Tura was her eldest daughter and that she was born on July 10, 1938: that about March 13, 1953, Tura called her mother by phone and told her she was staying at the home of a sister of one of her girl friends and was baby sitting: that she next saw her daughter Tuesday morning, March 31, 1953 when Tura returned home and informed her mother that she had been raped.

Tura Pascual testified that she was a sophomore at Montifiore High School: that about two or three weeks prior to March 27, 1953 she left her home and went to work for Mrs. Garland Barrett who lived at the time at No. 4505 Stanton Place, Downers Grove, Illinois: that between 9:30 and 10:00 o'clock on Thursday evening March 26, 1953, she and Mrs. Barrett went to Coburn's Tavern in Riverside: that she there met the defendant and his brother Bill, who were introduced to her by Mrs. Barrett: that she did not drink anything at the Tavern except water: that Mrs. Barrett and the Finley brothers were at the bar drinking until about 3:30 or 4:00 o'clock on the morning of March 27, 1953 when Mrs. Barrett, Tura, Bill and Kenneth Finley left in Bill Finley's car arriving at Mrs. Barrett's home between 4:30 and 4:45 o'clock in the morning: that upon their arrival at the Barrett home they all drank whiskey highballs: that she, Tura Pascual, drank two, became dizzy and sick, went to the bedroom occupied by Mrs. Barrett and herself, undressed and went to

bed somewhere between 5:30 and 6:00 o'clock A. M. on the morning of Friday, March 27, 1953: that she went to sleep, but does not know how long she slept: that when she awakened the defendant was on top of her havin sexual intercourse: that when he had completed his sexual relations with her, defendant got up from the bed and left the bedroom: that defendant had his trousers on when he was in bed with her and was also wearing a red and black checked shirt: that his penis had entered her private parts at the time she awoke: that she did not participate in the act but tried to push the defendant off of her, but was unable to do so: that after defendant left the bedroom she felt dizzy and sleepy and went back to sleep and awakened again about eleven o'clock that morning: that she got up, had breakfast with Mrs. Barrett and then told Mrs. Barrett that defendant had had intercourse with her: that March 27th was Saturday and she returned to her mother's home which was located at 2817 West Polk Street, the following day, Sunday, arriving there between 11:00 and 11:30 o'clock P. M.: that there, in the presence of her sisters, aged 4, 7, and 11 respectively, she told her mother she had been raped: that several days after she told this to her mother, she told her father. She further testified that during the two or three weeks she stayed with Mrs. Barrett, her parents did not know where she was.

On behalf of the defendant, Mrs. Garland Barrett, Bill Finley, brother of the defendant, and the defendant himself testified. Mrs. Barrett stated that Tura Pascual had been living with and working for her two or three weeks prior to March 27, 1953: that about ten o'clock on the evening of

March 27, 1953, she and Tura arrived at Coburn's Tavern: that she had not known the defendant until that evening, but had had a previous acquaintance with his brother Bill: that she, Tura, the defendant and his brother, Bill, remained at the Tavern until 3:00 or 3:30 o'clock the next morning: that Tura was in and out of the Tavern with different fellows during all the time they were there and until she, Tura, Bill and the defendant left the tavern in Bill's car: that in driving to her home, Bill and the defendant, sat in the front seat, and the witness and Tura sat in the rear seat: that the defendant was ill and vomited out of the window of the front seat of the car: that upon their arrival at her home, they entered and Tura went to bed and Mrs. Barrett made some coffee, served it to the defendant and his brother and the defendant and his brother left the house having been there not more than twenty minutes: that she, Mrs. Barrett, then went to the room where Tura was in bed: that she talked to her and got into the same bed and slept with her the balance of the night: that in the morning, this witness left the house to go after her children and when she did so, Tura was asleep and was still sleeping when she returned home about noon: that Tura never told her she had been raped and never complained of anything to her that night or the next morning except that she had a headache and that the first time she ever heard of any one being raped was sometime in May, 1953.

Bill Finley testified that he and his brother arrived at Coburn's Tavern about ten o'clock on the evening of March 26, 1953, but did not come together: that they remained there until 3:30 o'clock the next morning and that he drove Mrs. Barrett and Tura, who sat in the back seat of his car to the

home of Mrs. Barrett: that his brother, Kenneth, the defendant, was not feeling well and sat in the front seat of the car and upon their arrival at Mrs. Barrett's home, coffee was served, but no intoxicating liquor: that defendant was within the sight of this witness all the time they were at the Barrett home: that defendant was not in any bedroom at any time and the last time witness saw Tura, she was standing in the hallway, and shortly, thereafter, witness took the defendant to his home.

The defendant, 25 years of age, testified that he was a truck driver, married, and was living with his wife and eighteen-month-old son in Lyons and had never been arrested or in any trouble before. His testimony was substantially the same as the testimony of Mrs. Barrett and his brother about his arrival at the tavern, meeting his brother and being introduced to Tura and Mrs. Barrett, their drinking and their drive from the tavern to Mrs. Barrett's home, their arrival there, the serving to him of two cups of coffee by Mrs. Barrett, but no intoxicating liquor, and the drive to his home by his brother after a short stay at the Barrett Home. Defendant emphatically denied ever being in the bedroom of the Barrett home, and stated that he was never on top of Tura and never talked to her about sex and never had sexual intercourse with her and that the first time he was accused of having any sexual relationship with her was the latter part of May or the first of June, 1953, more than two months after the alleged occurrence.

The forgoing is all the evidence found in this record. It will be noted that the testimony of Tura Pascual, the prosecuting witness, is uncorroborated, but in several essential respects is contradicted. According to the prosecuting witness

she returned to her mother's home on Sunday, March 29th. Her mother says she did not come home on Sunday but came home the following Tuesday, March 31st. The prosecuting witness says she told her mother on Sunday night, March 29, between 11:00 and 11:30 o'clock, that she had been raped. Her mother says her daughter told her this on Wednesday, April 1, 1953. The prosecuting witness testified that she told Mrs. Barrett she had been raped about six hours after the occurrence. Mrs. Barrett denies this and testified that the first time she ever heard of it was two months later. The prosecuting witness testified Mrs. Barrett served highballs upon the return to her home. Mrs. Barrett, the brother of the defendant, and the defendant deny this. The prosecuting witness testified to the seats the parties occupied in the car upon their return to Mrs. Barrett's home from the Coburn Tavern at Riverside, and her version of how they sat in the car and what occurred is at variance with the testimony of the three other persons who were with her in the same car.

The law is that in order to convict the defendant of the offense of contributing to the delinquency of a child, the specific act on the part of the defendant directly tending to render the child delinquent must be alleged and proven beyond a reasonable doubt. (People v. Kohler, 413 Ill. 283; People v. Kohler, 413 Ill. 283; People v. Plocar, 411 Ill. 141). The specific act defendant is charged in count four with having committed is having raped the prosecuting witness. The trial court found defendant not guilty of having committed this offense as charged in counts one and three but upon the same evidence found defendant guilty of the same specific act as

she returned to her mother's home on Sunday, March 27th. Her mother says she did not come home on Monday but came home the following Tuesday, March 31st. The prosecuting witness says she told her mother on Sunday night, March 27, between 11:00 and 11:30 o'clock, that she had been raped. The mother says her daughter told her this on Wednesday, April 1, 1953. The prosecuting witness testified that she told Mrs. Barrett she had been raped about six hours after the occurrence. Mrs. Barrett denies this and testified that the first time she over heard of it was two months later. The prosecuting witness testified she, Barrett served liquor upon the return to her home. Mrs. Barrett, the brother of the defendant, and the defendant deny this. The prosecuting witness testified to the events the parties occupied in the car upon their return to Mrs. Barrett's home from the Dunham Tavern at Riverside, and her version of how they met in the car and what occurred is at variance with the testimony of the three other persons who were with her in the same car.

The law is that in order to constitute the defendant of the offense of contributing to the delinquency of a child, the specific act on the part of the defendant directly tending to render the child delinquent must be alleged and proven beyond a reasonable doubt. (People v. Dohler, 41 Ill. 233; [illegible] People v. Ziser, 411 Ill. 141). The specific act defendant is charged in count one with having committed is having raped the prosecuting witness. The trial court found defendant not guilty of having committed this offense as charged in counts one and three and upon the same evidence found defendant guilty of the same specific act as

charged in count four. These findings are inconsistent. If defendant is guilty of the specific act charged in count four, he was guilty of rape as charged in counts one and three of the indictment. The question presented for our consideration, however, upon this record is whether or not the evidence sustains the finding and judgment of the trial court.

Counsel for the People state that the trial court observed the several witnesses as they testified; that he rejected the testimony of Mrs. Barrett, Bill Finley, and the defendant and, also, some of the testimony of the mother of the prosecuting witness and accepted the testimony of the prosecuting witness as true.

We recognize that the trial judge had full opportunity to observe the witnesses while testifying and that the trial court is always in a far better position to weight their testimony than is this court and that when there is no jury, the law has committed to the trial court the determination of the credibility of the witnesses and of the weight to be accorded to their testimony and that this court should not substitute its judgment for that of the trial court where the evidence is merely conflicting. (People v. Ristau, 363 Ill. 583,9; People v. Cullotta, 376 Ill.333, 338). A careful review of the evidence found in this record leaves us with a substantial doubt of the guilt of the defendant. The conviction of the defendant rests solely upon the testimony of the prosecuting witness which was in no material respect corroborated but was contradicted by her own relative and friend. It is, therefore, the duty of this court to reverse the judgment of the trial court, and where it does not appear that there are other witnesses available than those who have already testified,

there is no necessity of remanding the cause for a new trial. (People v. Bradley, 375 Ill. 182, 185).

Judgment reversed.

Wolfe, J. concurs.

Anderson, J., took no part.

there is no necessity of remanding the cause for a new trial.

(People v. Beasley, 374 Ill. 182, 188).

Judgment reversed.

Wolfe, J. concurs.

Anderson, J., took no part.

General No. 10762 | 3 I.A.2d 281 Agenda No. 9

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1954

JAMES KARLOS, Executor of the Last Will of JOHN PAGONAS, Deceased, Plaintiff-Appellant, vs. GEORGE PAPPAS, Defendant-Appellee.	Appeal from the Circuit Court of Lake County.

Dove, J.

Upon a promissory note dated November 1, 1946, for the principal sum of $6000.00 payable to the order of John Pagonas two years after date, the Circuit Court of Lake County on March 1, 1951, rendered a judgment by confession against the maker, George Pappas, for $6600.00 in favor of James Karlos, executor of the Last Will and Testament of the said John Pagonas, deceased, and against the maker, George Pappas. The note contained a warrant of attorney in the usual form and provided for reasonable attorney fees but did not draw interest.

On March 19, 1951, an execution was served on the defendant. A few days thereafter defendant gave notice to counsel for plaintiff that he would appear before the Court on March 26, 1951, and present a motion to vacate the judgment and that this cause be set for trial before a jury. A copy of the proposed motion was attached to the notice. This motion ~~notion~~ was supported by the affidavit of the defendant in

General No. 10,112 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1934

Abstract

JAMES KARLOS, Executor of the Last Will of JOHN PAGONAS, deceased, Plaintiff-appellant, vs. GEORGE PAPPAS, Defendant-appellee.	Appeal from the Circuit Court of Lake County.

Note, 1.

Upon a promissory note dated November 1, 1926, for the principal sum of $5000.00 payable to the order of John Pagonas two years after date, the Circuit Court of Lake County on March 1, 1931, rendered a judgment by confession against the maker, George Pappas, for $5000.00 in favor of James Karlos, executor of the last Will and Testament of the said John Pagonas, deceased, and against the maker, George Pappas. The note contained a warrant of attorney in the usual form and provided for reasonable attorney fees but did not draw interest.

On March 19, 1931, an execution was served on the defendant. A few days thereafter defendant gave notice to counsel for plaintiff that he would appear before the Court on March 26, 1931, and present a motion to vacate the judgment and that this cause be set for trial before a jury. A copy of the proposed motion was attached to the notice. This motion was supported by the affidavit of the defendant in

which he swore, among other things, that defendant, prior to the first part of October, 1947, paid the payee in cash upon said note the sum of $2500.00 at one time and $1000.00 at another time; that on July 30, 1948, affiant paid Pagonas $1000.00 upon said note by his personal check and on August 9, 1948, paid the balance of said note by his check for $1500.00. Thereafter, upon leave granted, defendant filed in support of his motion to vacate the judgment, the affidavit of Lydia Kearney which recited that payments had been made by Pappas upon the note substantially as outlined in the Pappas affidavit. This affidavit was subsequently amended and, as amended, affiant averred that she was mistaken when she set forth in her previous affidavit that the check for $1500.00 was issued and delivered to John Pagonas on August 9, 1948, but that said check was actually issued and delivered to Pagonas on November 2, 1948.

Upon a hearing of this motion, an order was entered on April 18, 1952, that the judgment be opened and the cause was set for trial by a jury on May 15, 1952. This setting was subsequently cancelled upon the motion of the defendant. On December 2, 1952, the defendant filed a motion to set the cause for trial by jury. Plaintiff objected to the case being heard by a jury on the ground that no previous request for a jury trial had been made by defendant. On December 5, 1952, this objection was overruled and the cause set for trial before a jury. On January 6, 1953, just before the commencement of the trial, plaintiff, upon leave granted, filed his reply denying that the note sued on was paid in whole or in part. The issues made by these pleadings were submitted to a jury which returned a verdict for the defendant, and from an appropriate judgment rendered on that verdict the plaintiff appeals.

which he wrote, among other things, that defendant, prior to the first part of October, 1947, paid the payee in cash upon said note the sum of $2500.00 at one time and $1000.00 at another time; that on July 30, 1948, affiant paid Pegoraro $1000.00 upon said note by his personal check and on August 9, 1948, paid the balance of said note by his check for $1500.00. Thereafter, upon leave granted, defendant filed in support of his motion to vacate the judgment, the affidavit of Lydia Kearney which recited that payments had been made by Pappas upon the note substantially as outlined in the Pappas affidavit. This affidavit was subsequently amended and, as amended, affiant averred that she was mistaken when she set forth in her previous affidavit that the check for $1500.00 was issued and delivered to John Pegoraro on August 9, 1948, but that said check was actually issued and delivered to Pagoraro on November 2, 1948.

Upon a hearing of this motion, an order was entered on April 19, 1952, that the judgment be opened and the cause was set for trial by a jury on May 19, 1952. This setting was subsequently cancelled upon the motion of the defendant. On December 2, 1952, the defendant filed a motion to set the cause for trial by jury. Plaintiff objected to the case being heard by a jury on the ground that no previous request for a jury trial had been made by defendant. On December 5, 1952, this objection was overruled and the cause set for trial before a jury. On January 6, 1953, just before the commencement of the trial, plaintiff, upon leave granted, filed his reply denying that the note sued on was paid in whole or in part. The issues made by these pleadings were submitted to a jury which returned a verdict for the defendant, and from judgment rendered on that verdict the plaintiff appeals.

It is first insisted by appellant that the trial court erred in granting defendant's motion to open the judgment originally entered by confession because the affidavits filed by defendant is support of his motion were made by defendant himself, and by Lydia Kearney a former wife of defendant: That both the defendant and his former wife were incompetent witnesses and being incompetent witnesses they were not competent persons to make the affidavits.

We have examined the record in this case and evidently Lydia Kearney whose affidavit was filed in support of defendant's motion to vacate the judgment was at one time the wife of defendant but there is nothing in the motion to vacate the judgment or the affidavits filed in support thereof that would inform the trial court that she was the wife of defendant at the time of the several transactions involved in this proceeding. If such was the fact and appellant desired to avail himself of the rule that makes her an incompetent affiant, it should have been brought to the attention of the trial court prior to April 18, 1952, the date the order was entered opening the judgment by confession.

According to counsel for appellant the first time any mention of the fact that Lydia Pappas was the wife of George Pappas appeared in the affidavit of George Pappas filed May 14, 1952 in support of his motion for a continuance on account of the illness of George Preston, a material witness, who was in the hospital at that time. All this affidavit recited was that George Preston, if present, would testify that Lydia Pappas, wife of George Pappas was present at the time of the several payments on the note made by defendant. There was nothing in this affidavit to lead the court to conclude that Lydia Pappas

It is first insisted by appellant that the trial court erred in granting defendant's motion to open the judgment originally entered by default because the affidavits filed by defendant in support of his motion were made by defendant himself, and by Lydia Kearney a former wife of defendant; that both the defendant and this former wife were incompetent witnesses and being incompetent witnesses they were not competent persons to make the affidavits.

We have examined the record in this case and evidently Lydia Kearney whose affidavit was filed in support of defendant's motion to vacate the judgment was at one time the wife of defendant but there is nothing in the motion to vacate the judgment or the affidavits filed in support thereof that would inform the trial court that she was the wife of defendant at the time of the several transactions involved in this proceeding. If such was the fact and appellant desired to avail himself of the rule that makes her an incompetent witness, it should have been brought to the attention of the trial court prior to April 16, 1923, the date the order was entered vacating the judgment by consent.

According to counsel for appellant the first time any mention of the fact that Lydia Fagan was the wife of George Fagan appeared in the affidavit of George Fagan filed May 7, 1923 in support of the motion for a continuance on account of the illness of George Fagan, a material witness, who was in the hospital at that time. But this affidavit neither was made George Fagan, if present, would testify that Lydia Fagan, wife of George Fagan was present at the time of the several payments on the note made to defendant. There was nothing in this affidavit to lead the court to conclude that Lydia Fagan

and Lydia Kearney were one and the same person. Upon the hearing several of the witnesses referred to the former wife of defendant as "Lydia," and in the argument of counsel for defendant before the jury he referred to the fact that under the law defendant was not permitted to testify as to any transactions with plaintiff's testate prior to his death and that this rule also applied to his former wife. It further appears that at the instance of the defendant, the court instructed the jury that under the law the defendant and his former wife, Lydia, were incompetent witnesses as to any transactions between the parties prior to the death of John Pagonas.

Counsel for appellant state that defendant's counsel did not inform the court of the incompetency of Lydia Kearney when her affidavit to open the judgment was presented to the court, and counsel insist that affidavits in support of a motion to open a judgment must stand or fall upon their own strength or weakness. This is true, and the affidavit of Lydia Kearney should have affirmatively shown, as the Rules of the Supreme Court require, that she, if sworn as a witness, could testify competently to the matters set forth in her affidavit. Because of this omission the trial court would have been justified in entering an order, if requested by plaintiff, striking her affidavit.

The same section of the Practice Act (Ill. Rev. Stat. chap. 110, sec. 50) which authorizes the confession of a judgment without process grants to a court the power to set aside any judgment within thirty days after entry thereof upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable (Ill. Rev. Stat. chap. 110, sec. 50, sub-par. 7). In the

and Lydia Kearney were one and the same person. Upon the hearing several of the witnesses referred to the former wife of defendant as "Lydia," and in the argument of counsel for defendant before the jury he referred to the fact that under the law defendant was not permitted to testify as to any transactions with plaintiff's testate prior to his death and that this rule also applied to his former wife. It further appears that at the instance of the defendant, the court instructed the jury that under the law the defendant and his former wife, Lydia, were incompetent witnesses as to any transactions between the parties prior to the death of John Ragonas.

Counsel for appellant state that defendant's counsel did not inform the court of the incompetency of Lydia Kearney when her affidavit to open the judgment was presented to the court. Nor counsel insist that affidavits in support of a motion to open a judgment must stand or fall upon their own strength or weakness. This is true, and the affidavit of Lydia Kearney should have affirmatively shown, as the Rules of the Supreme Court require, that she, if sworn as a witness, could testify competently to the matters set forth in her affidavit. Because of this omission the trial court would have been justified in entering an order, if requested by plaintiff, striking her affidavit.

The same section of the Practice Act (Ill. Rev. Stat. chap. 110, sec. 50) which authorizes the confession of a judgment without process grants to a court the power to set aside any judgment within thirty days after entry thereof upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable (Ill. Rev. Stat. chap. 110, sec. 50, sub-par. 7). In the

instant case the judgment by confession was rendered on March 1, 1951, and the motion to vacate filed on March 26, 1951. Supreme Court Rule 26 (Ill. Rev. Stat. chap. 110, sec. 259.26) provides that a motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 15 for summary judgments, and that if the motion and affidavit discloses a prima facie defense on the merits to the whole or a part of plaintiff's demand, the court shall set such motion down for hearing; that the plaintiff may file counter affidavits and if, at the hearing of such motion, it shall appear that the defendant has a defense on the merits to the whole or part of plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall sustain such motion and the case shall thereafter proceed to trial, and the complaint, motion and affidavit and counter affidavits shall constitute the pleadings unless the parties, or either of them, shall ask leave to file further pleadings.

Under the Evidence Act, neither the defendant, or his former wife were ~~was not a~~ competent witness to testify to facts occurring prior to the death of plaintiff's testate (Ill. Rev. Stat. 1953, chap. 51, sec. 2; Heineman v. Hermann, 385 Ill. 191; Hann v. Brooks, 331 Ill. App. 535). Not being competent witnesses, they were not competent affiants in the several affidavits filed in support of the motion to open the judgment. (Ill. Rev. Stat. 1953, chap. 110, sec. 259.15 - Sup. Court Rule 15). Courts exercise over a judgment entered by confession on a warrant of attorney an equitable jurisdiction, and a motion to open such a judgment is addressed to the sound judicial discretion

instant case the judgment by confession was rendered on March 1, 1951, and the motion to vacate filed on March 26, 1951. Supreme Court Rule 26 (111. Rev. Stat. chap 110, sec. 259.26) provides that a motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 15 for summary judgments, and that if the motion and affidavit disclosed a prima facie defense on the merits to the whole or a part of plaintiff's demand, the court shall set such motion down for hearing; that the plaintiff may file counter affidavits and if, at the hearing of such motion, it shall appear that the defendant has a defense on the merits to the whole or part of plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall sustain such motion and the case shall thereafter proceed to trial, and the complaint, motion and affidavit and counter affidavits shall constitute the pleadings, unless the parties, or either of them, shall ask leave to file further pleadings.

Under the Evidence Act the defendant competent witness to testify to facts occurring prior to the death of plaintiff's testate(111. Rev. Stat. 1951, chap. 51, sec. 2; Heineman v. Herrmann, 385 111. 191; Hann v. Brooks, 331 111. App. 535). Not being competent witnesses, they were not competent affiants in the several affidavits filed in support of the motion to open the judgment. (111. Rev. Stat. 1951, chap. 110, sec. 259.15 - Sup. Court Rule 15). Courts exercise over a judgment entered by confession on a warrant of attorney an equitable jurisdiction, and a motion to open such a judgment is addressed to the sound judicial discretion

of the court. (First Nat'l Bank v. Galbraith, 271 Ill. App. 240,247). The order opening such a judgment is an interlocutory one and, inasmuch as the insufficiency of these affidavits was not, so far as the record discloses, brought to the attention of the trial court, we believe, in view of the entire record in this case, that the order opening this judgment was not erroneously entered.

It is next insisted by appellant that no demand for a jury trial was made until seven months after the order entered on April 18, 1952, opening this judgment and that, therefore, the trial court erred in submitting the issues to a jury. Rule 26 of the Supreme Court provides that when a motion to open a judgment is sustained, the case shall thereafter proceed to trial and the issues shall be tried by the court, without a jury, unless the defendant or the plaintiff demands a jury at the time of the entry of the order opening the judgment. (Ill. Rev. Stat., 1953, chap. 110, sec. 259.26). ~~There is no merit in this contention.~~ The order opening the judgment was entered on April 18, 1952, and that order set the cause "for trial by jury on May 15th next." Counsel for appellant state that the trial court arbitrarily entered this order without any demand for a jury trial on the part of the defendant and that it was wrong for the trial court to grant a trial by jury. The record does not sustain this charge. While the motion filed by defendant on March 26, 1951, did not demand a jury, the notice, however, to counsel for plaintiff informed plaintiff that the defendant would appear in court on March 26, 1951, and file his motion requesting that the judgment be opened and the cause set

of the court. (First Nat'l Bank v. Halbrook, 211 Ill. App. 240,247). The order opening such a judgment is an interlocutory one and, inasmuch as the insufficiency of these affidavits was not, so far as the record discloses, brought to the attention of the trial court, we believe, in view of the entire record in this case, that the order opening this judgment was not erroneously entered.

It is next insisted on behalf of appellant that no demand for a jury trial was made until seven months after the order entered on April 16, 1932, opening this judgment and that, therefore, the trial court erred in submitting the issues to a jury. Rule 26 of the Supreme Court provides that when a motion to open a judgment is sustained, the case shall thereafter proceed as tried and the issues shall be tried by the court, without a jury, unless the defendant or the plaintiff demands a jury at the time of the entry of the order opening the judgment. (111. Rev. Stat., 1937, Comp. 110, sec. 27,2a).

[illegible] The order opening the judgment was entered on April 16, 1932, and that order set the cause "for trial by jury on May 17th next." Counsel for appellant state that the trial court erroneously entered this order without any demand for a jury trial on the part of the defendant and that it was wrong for the trial court to impose a trial by jury. The record does not sustain this claim. While the motion filed by defendant on March 26, 1932, did not demand a jury, the motion, however, is issued for plaintiff indicated plaintiff that the defendant would appear to contest by March 26, 1932, and this motion requested that the judgment be opened and the cause set

for trial before a jury. The filing of this notice and motion constituted the first appearance of defendant, and, while the motion itself did not in express words demand a jury trial, the notice which accompanied the motion did and, in our opinion, was sufficient to apprise plaintiff of defendant's desire for a jury trial. The trial court evidently so construed it because the order which opened the judgment entered on April 18, 1952, set the cause for trial by jury on May 15, 1952.

Furthermore, the record discloses that on December 2, 1952, defendant filed his motion to set the case for trial by jury. Objections to this motion setting forth that defendant was not entitled to a jury trial because he had not demanded one, as required by the Practice Act, were filed by the plaintiff. These objections were overruled by the trial court and a jury trial awarded. The trial court was warranted in treating plaintiff's notice which accompanied his motion to open the judgment as a sufficient demand for a jury trial. However, in view of the record, the trial court did not abuse its discretion in submitting the issues made by the pleadings to a jury. (Stephens v. Kasten, 383 Ill. 127; Vail v. City of Paris, 344 Ill. App. 590; Roszell v. Gniadek, 348 Ill. App. 341; Osgood v. Skinner, 186 Ill. 491).

It is next insisted that the evidence does not sustain the verdict finding the issues for the defendant, and in this connection counsel call our attention to the fact that the evidence discloses that the note sued on was found in the safety box of plaintiff's testate and that possession of a promissory note in the hands of the personal representative of the payee is prima facie evidence that it has not been paid.

for trial before a jury. The filing of this motion (and motion constituted the total appearance of defendant), and, while the motion itself did not in express terms demand a jury trial, the notice which accompanied the motion did so, in our opinion, was sufficient to apprise plaintiff of defendant's desire for a jury trial. The trial court erroneously so construed it, however, the order which opened the judgment entered on April 14, 1952, set the cause for trial by jury on May 26, 1952.

Furthermore, the record discloses that on December 3, 1952, defendant filed his motion to set the case for trial by jury. Objections to this motion contended that defendant was not entitled to a jury trial because he had waived one, as required of the practice act, were filed by plaintiff. These objections were overruled by the trial court and a jury trial ensued. The trial court was warranted in overruling plaintiff's motion which accompanied his motion to open the judgment as a sufficient demand for a jury trial. However, in view of the record, the trial court did not abuse its discretion in sustaining the issues made by the pleadings to a jury. (Hayward v. Kasten, 383 Ill. 127; Vail v. City of Paris, 346 Ill. App. 590; Cassell v. Orlando, 414 Ill. App. 341; Osmond v. Bulmer, 186 Ill. 491).

It is more important that the evidence does not sustain the verdict finding the issues for the defendant, and in this connection counsel call our attention to the fact that the evidence discloses that the note sued on was found in the safety box of plaintiff's father and that possession of a promissory note in the hands of the personal representative of the payee is prima facie evidence that it has not been paid.

Counsel further insist that payment is an affirmative defense and that it is not sufficient to merely show that payments were made to the creditor but that such payments must be shown to have been made by the maker and received by the payee upon the particular obligation sued upon. Counsel argue that the evidence found in this record does not satisfactorily show that the defendant made payment of the note sued on and that the verdict of the jury was the product of prejudice and confusion.

It appears from the record that John Pagonas died in April, 1950, and that the note sued on was found by his executor in his safety deposit box in the First National Bank of Waukegan a few days after his death. Upon the note was written "This note is secured by an assignment bearing even date herewith to John Pagonas on real estate in Lake County, Illinois."

Michael Gremparis testified on behalf of the defendant to the effect that he had been in the restaurant business for thirty-two years and from 1946 to 1948 was associated with defendant in a business conducted under the name of "Clover Inn Tavern" in Waukegan Township; that in 1946 defendant obtained $6,000.00 from Pagonas by check and he executed the note sued on and assigned to Pagonas a contract; that in October, 1947, Pagonas came into the Clover Inn, bought a few drinks, and told defendant that he had had a bad day and needed $1,000.00 to go to Florida and asked defendant for that amount; that defendant told his wife to get the money, which she did, and she handed the money to defendant and he, in turn, gave it to Pagonas.

Counsel further insists that payment is an affirmative defense and that it is not sufficient to merely show that payments were made to the creditor but that such payments must be shown to have been made by the debtor and received by the payee with the particular obligation even upon. Counsel argue that the evidence found in this record does not satisfactorily show that the defendant made payment of the note sued on and that the verdict of the jury was the product of prejudice and confusion.

It appears from the record that John Thomas died in April, 1930, and that his will was in his hands by his executor in his safety deposit box in the First National Bank of Waukegan a few days after his death. Upon the note was written "This note is assumed by my assignment bearing even date herewith to John Thomas on real estate in Lake County, Illinois."

Michael Georgeas testified on behalf of the defendant to the effect that he had been in the restaurant business for thirty-two years and from 1920 to 1929 was associated with defendant in a business conducted under the name of "Clover Inn Tavern" in Waukegan township; that in 1929 certain; obligations in 20,000.00 Lake Bonds by check and he executed the note sued on and assigned to Thomas a contract; that in October, 1929, Georgeas came into the Clover Inn, bought a new cabinet, and told defendant that he had had a bad day and needed $1,000.00 to go to Florida and asked defendant for that amount; that defendant told his wife to get the money, which she did, and she handed the money to defendant and he, in turn, gave it to Georgeas."

The testimony of Gremparis in connection with the payment of $1,000.00 in cash by Pappas to Pagonas in October, 1947, was corroborated by Wallace Vandeventer who testified that he worked at the Clover Inn Tavern for defendant and Gremparis; that one evening during the latter part of October, 1947, Pagonas came into the tavern about six or seven o'clock, bought a round of drinks, and Pagonas told Pappas that they had closed up his bookie; that he wanted to go back to Florida and needed $1,000.00; that Pappas told his wife, Lydia, who was there, to get the money in the back room; that Lydia did so and brought a bundle of money with her, and Pappas counted out $1,000.00 in bills and handed it to Pagonas. This witness further testified that Gremparis was behind the bar at the time and that Gremparis handed Pagonas a piece of paper at his request, and Pagonas wrote on the paper, in the presence of this witness, "Received from George Pappas $3,500.00 balance due $2,500.00"; that after writing this, Pagonas signed his name to this receipt.

Clayton Norton testified that Pagonas was a bookie, transacting business at 118 Washington Street, Waukegan, on the second floor; that he, Norton, worked for him from the spring of 1948 until his death; that on or about November 2, 1948, Pappas came in Pagonas' place of business; that Pagonas, Pappas, and Pappas' former wife were there; that Pappas asked Pagonas how things were, and Pagonas told Pappas that he had had bad luck, and Pagonas asked Pappas if he could get the balance Pappas owed him, and Pappas said he could; that Pappas' former wife, Lydia, was there and made out a check, and this witness identified the check dated November 2, 1948, for $1,500.00 signed by Pappas, payable to John Pagonas and endorsed by him and paid by the bank on which it was drawn. Norton further testified that when Pappas delivered the $1,500.00 check

The testimony of Dempsey in connection with the payment of $1,000.00 in cash by Pappas to Fagnes in October, 1947, was corroborated by Wallace Vandenbosch who testified that he worked at the Clover Inn Tavern for defendant Grumpelia; that one evening during the latter part of October, 1947, Pagones came into the tavern about six or seven o'clock, bought a round of drinks, and Pagones told Pappas that they had closed up his bookie; that he needed $1,000.00; that Pappas told his wife, Lydia, who was there, to get the money in the back room; that Lydia did so and brought a bundle of money with her, and Pappas counted out $1,000.00 in bills and handed it to Pagones. This witness further testified that Grumpelia was behind the bar at the time and that Grumpelia handed Pagones a piece of paper at his request, and Pagones wrote on the paper, in the presence of this witness "Received from George Pappas $1,000.00 balance due $2,500.00"; that after writing this, Pagones placed his name to the receipt.

Clarion Norton testified that Pagones was a bookie, transacting business at 118 West Lagon Street, Muskegon, on the second floor; that he, Norton, worked for him from the spring of 1940 until his death; that on or about November 2, 1948, Pappas came in Pagones' place of business; that Pagones, Pappas and Pappas' former wife were there; that Pappas asked Pagones how things were, and Pagones told Pappas that he had had bad luck, and Pappas asked Pappas if he could get the balance Pappas owed him, and Pappas said he could; that Pappas' former wife, Lydia, was there and made out a check, and this witness identified the check dated November 2, 1948, for $1,500.00 signed by Pappas, payable to John Pagones and endorsed by him and paid by the bank on which it was drawn. Norton further testified that when Pappas delivered the $1,500.00 check

to Pagonas, Pagonas told him, Pappas, that he would get the papers for him the next day.

A contract dated March 1, 1945, executed by Regina and Eloise K. Mueller and George and Clara Pappas, evidencing that the Muellers were selling and that the Pappases were buying certain described real estate in Lake County, Illinois, for $17,837.50, of which amount the Purchasers had paid $5,837.50, leaving a balance of $12,000.00 payable in installments of $1,000.00 each on the first day of February and first day of August each year until paid, together with a written assignment thereof signed by George Pappas to Pagonas, which assignment recited the execution of the $6,000.00 note which forms the basis of this action and that Pappas desired to secure its payment by assigning the contract to Pagonas, was produced on the hearing by defendant and offered and admitted in evidence, and the evidence is that this contract and assignment never came into the hands of the plaintiff, as executor, and was not in the safety deposit box of Pagonas at the time of his death.

A check drawn on the First National Bank of Waukegan and dated July 30, 1948, for $1,000.00, payable to John Pagonas and signed by George Pappas, was also offered and admitted in evidence. The evidence shows that this check was duly endorsed by the payee and that he, Pagonas, obtained a cashier's check or draft from the bank in the same amount the following day. Another check identified by the witness Norton drawn on the same bank dated November 2, 1948, for the sum of $1,500.00, payable to John Pagonas, was also offered and admitted in evidence. This check was duly endorsed by Pagonas, and the records of the bank upon which it was drawn and where

to Pagonas, Pagonas told him, [illegible], that he would get the papers for him the next day.

A contract dated March 1, 1[illegible], executed by Deyna and Flaine M. Miller and Pagonas and Elena Pagonas, evidencing that the Miller[illegible] were selling the [illegible] were buying certain described real estate in Cook County, Illinois, for $17,[illegible] of which amount the Pagonas had paid $[illegible], leaving a balance of $12,000.00 payable on instalments of $1,000.00 each on the first day of February and first day of August each year until paid, together with a written assignment thereof signed by George Pagonas to Pagonas, which assignment recited the execution of the $6,000.00 note which forms the basis of this action and that Pagonas desired to secure its payment by assigning the contract to Pagonas, was produced on the hearing by defendant and offered and admitted in evidence, and the evidence is that this contract and assignment never came into the hands of the plaintiff, as executor, and was not in the latter's possession or Pagonas at the time of his death.

A check drawn on the First National Bank of Waukegan and dated July 20, 1[illegible], for $1,000.00, payable to John Pagonas and signed by George Pagonas, was also offered and admitted in evidence. The evidence showed that this check was duly endorsed by the payee and then by Pagonas, bearing a [illegible] check or draft from [illegible] in the same amount the [illegible] Pagonas. Another check on the First National Bank of Waukegan, dated [illegible], for the sum of $1,000.00, payable to John Pagonas, was also offered and admitted in evidence. This check was duly endorsed by Pagonas, and the reverse of the same shows it was cashed and [illegible]

Pagonas kept his account show that this check was deposited by Pagonas and duly credited to his account.

From a consideration of all the evidence found in this record, the jury were warranted in finding that the defendant met the requirement which the law imposed upon him to show that the payments made by him were made and were received by Pagonas upon the particular obligation sued on. There is no evidence in the record as to any other obligation to which the payments made by defendant could have applied. The evidence is that in the latter part of October, 1947, Pagonas received from Pappas $1,000.00 in cash and at that time Pagonas executed a receipt in which Pagonas acknowledged that Pappas had paid him $3,500.00, leaving a balance due of $2,500.00. The subsequent payment by Pappas of this $2,500.00, evidenced by the checks in evidence taken with the evidence concerning them, and the statement of Pagonas when the final $1,500.00 was paid that he, Pagonas, would get the papers for Pappas and give them to him the following day, together with the production of the assignment by the defendant and all the other corroborative evidence found in this record, justified the verdict returned by the jury. It might also be noted that the evidence discloses that at the time of the death of Pagonas, he, Pagonas, and defendant were, and had been for some time, partners engaged in the business conducted as the Clover Inn Tavern; that although plaintiff, as executor of the will of Pagonas, came into possession of the note sued on in this case three days after the death of Pagonas, he refrained from informing defendant of this obligation until ten months later and then not until the partnership affairs of Pagonas and Pappas had been completely settled.

Pagones kept his account show that this check was deposited by Pagones and duly credited to his account.

From a consideration of all the evidence found in this record, we have been satisfied in finding that the defendant met the requirement which the law imposed upon him to show that the payments made by him were made and were received by Pagones upon the particular occasions named on. There is no evidence in the record as to any other occasion on which the payments made by defendant could have applied. The evidence is that in the latter part of October, 1921, Pagones received from Pappas $1,000.00 in cash and at that time Pagones executed a receipt in which Pagones acknowledged that Pappas had paid him $3,500.00, leaving a balance due of $2,500.00. The acknowledgment by Pappas of this $2,500.00, evidenced by the check, is evidence taken with the evidence concerning them, and the statement of Pagones when the final $1,000.00 was paid back to Pappas, would get the money, the Pappas was also then to pay the following day, together with all the other corroborative evidence found in this record, justified the verdict returned by the jury. It might also be noted that the evidence disclosed that at the time of the death of Pagones, the Pappas, and defendant were, and had been for some time, partners engaged in the business conducted as the Glover Inn Restaurant. That difficult relationship, as between of the wife of Pagones, some very questionable, it has made and in this case there exist other the death of Pagones, is reflected from informing testimony of this wife which will be months later and then not until the questionable affairs of Pagones and Pappas had been completely settled.

It is finally insisted that the trial court erred in refusing to admit in evidence twenty-one checks signed and delivered by Pagonas, payable to the order of defendant and by him endorsed, varying in amounts and aggregating $27,894.51. What the record shows is that after defendant had rested his case, counsel for plaintiff stated he desired to offer in evidence twenty-one checks, stating that counsel had stipulated to the authenticity of the signatures. Counsel argue that the exclusion of these checks took away from the consideration of the jury any consideration of any other transactions between the parties and that by implication the ruling of the court amounted to a direction to the jury that there was but one item of indebtedness for their consideration. Plaintiff did not offer any evidence, nor did he propose to offer any, in connection with any of these checks, nor did he show or offer to show any transaction to which any of them related, and none of the checks related in any way to any of the evidence in the record. In the absence of any such evidence the trial court did not err in refusing their admission in evidence. None of them tended either to corroborate or contradict any evidence in the record and they were all, therefore, irrelevant. Nor did the court err in permitting the defendant to testify that after the death of Pagonas, he, the defendant, looked through his papers and records and was unable to find any receipt. (Mariner v. Saunders, 10 Ill. 113). While counsel for appellant insists that this was error, the abstract of the testimony of this witness prepared by counsel for appellant does not show that any objection thereto was made at the trial nor that any motion to strike the testimony

It is clearly indicated that the trial court erred in refusing to admit in evidence twenty-one months elapsed and delivered by Thomas, prepaid, to the order of Hartman and it has endorsed, varying in amounts and corresponding dates. That the record shows in that after defendant had rested his case, counsel for plaintiff stated he desired to offer in evidence twenty-one checks, stating they covered and stipulated in the authenticity of the signatures. Counsel argue that the evidence of these checks had been from the consideration of the jury any consideration of any other transactions between the parties and that by implication and failing of the court assented to a direction to the jury that there is not one of indebtedness for which consideration. Plaintiff did not offer any evidence, but did be proposes to offer any, to contradict the any of these checks, nor did he deny or offer to show any transaction in which any of the parties, and each of the checks pertained in any way to any of the evidence in the record. In the absence of any such evidence the trial court did not err in refusing their admission in evidence. Note of these checks either to corroborate or contradict any evidence in the record and they were all, therefore, irrelevant. Nor did the court err in permitting the defendant to identify the signature of the drawer, the, the defendant, issued from the plaintiff and records and was unable to find any receipt. (Hartman v. Bradford, 10 Ore. 113). While counsel for appellant indicate that this was error, the answer of the witness to this question is proper or correct. For appellant does not show that the substantial rights was made at the trial for that not notice to strike the testimony

was interposed. Nor did the court err in refusing to permit the witness George Meyer to testify to a statement made by Pagonas in the barber shop of the witness in the spring of 1949 to the effect that Pappas owed him $6,000.00. It was shown that Pappas was not present when this statement was made. It was, therefore, a self-serving declaration and clearly incompetent. (Treadway v. Treadway, 5 Ill. App. 478, 479; Bishop v. Estate of Bishop, 95 Ill. App. 53, 54).

Finding no reversible error in this record, the judgment of the trial court is affirmed.

Judgment affirmed.

Wolfe, J., concurs.

Anderson, J., took no part.

was interposed. Nor did the court err in refusing to permit the witness Morris Dayer to testify to a statement made by Pagones in the barber shop of the witness in the spring of 1965 to the effect that Pagones owed him $2,000.00. It was shown that Pagones was not present when this statement was made. It was, therefore, a self-serving declaration and clearly incompetent. (Hawkins v. Hawkins, 6 Ill. App. 472, 476; Bishop v. Estate of Bishop, 95 Ill. App. 83, 86).

Finding no reversible error in this record, the judgment of the trial court is affirmed.

Judgment affirmed.

Wolfe, J., concurs.

Anderson, J., took no part.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

May Term, A. D. 1954

Term No. 54-M-8 Agenda No 8

BETTY ANN PERRY, a Minor; GRACE ALSIP, JOYCE ALSIP, a Minor, and HERBERT ALSIP, Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Johnson County.
vs.	)	
JOHN RICHERSON, BETTY JUNE RICHERSON and VELMA HALL, Defendant-Counterplaintiffs-Appellants.	)	

BARDENS, J.

Plaintiffs-appellees, hereinafter called plaintiffs, filed their complaint in the Circuit Court of Johnson County against defendants-appellants, hereinafter called defendants, for personal injuries and property damage arising out of an automobile accident. A jury returned verdicts for the various plaintiffs and found against the defendants with respect to their counterclaims. Motions for judgment notwithstanding the verdict and for a new trial were overruled as were motions for a directed verdict at the end of plaintiffs' evidence and at the close of all the evidence. Defendants assign these rulings as error and allege that the verdicts are against the manifest weight of the evidence and the result of sympathy and prejudice of the jury. Certain instructions given by the

court are also alleged to be erroneous.

The accident in question occurred on Illinois State Route 146 east of Vienna as defendant John Richerson, proceeding in an easterly direction, collided with the car containing the plaintiffs which had come out on the highway from a private drive. The exact point of impact was highly controverted by the witnesses for each side. Plaintiff Betty Ann Perry, age 17, testified that she drove her father's 1941 Chevrolet north out of the private lane and, after stopping at the edge of the pavement, made a right hand turn onto the highway; that she had proceeded 60 to 70 feet east on the highway when hit from behind by defendant's car. She testified that she was driving 30 to 35 M.P.H. and that defendant was going 60 or 70. The passengers in plaintiff's car all testified that their car had stopped at the edge of the pavement, had then made the turn onto the highway and was 30 to 40 feet east ofthe intersection when struck in the rear by defendant's car. These witnesses were Betty Ann Perry's mother, her 16 year old brother and her 12 year old sister. In addition plaintiff presented the testimony of a neighbor and others who did not see the accident but who observed the position of plaintiff's car after the impact 30 to 40 feet east of the intersection. The only other witness for plaintiffs who testified as to defendant's speed was the neighbor who observed that in his opinion defendant's car was going 45 or 50 m.p.h. This witness also testified that after the accident Betty Ann Perry was lying on the highway 10 to 20 feet east of the intersection and that defendant said he had missed his brake.

The defendant and the passengers in his car, his wife and sister-in-law, testified that the impact occurred at the intersection of the highway and the private lane as

the plaintiffs were in the process of turning onto the highway. They also introduced the testimony of two State Highway Patrolmen and a constable to the effect that when they arrived at the scene of the accident they noticed debris at the intersection and scattered over the road east for a distance of 40 or 50 feet to where plaintiff's car was stopped. Pictures taken of plaintiff's car were received into evidence and show damage to the left side and left rear. In addition to this evidence as to point of impact, the occupants of the defendant's car testified that at the time of the accident and prior thereto defendant was driving approximately 45 to 50 M. P. H.; that when they were 30 or 40 feet west of the intersection they saw the Perry car for the first time as it pulled out on the highway in front of them; and that defendant immediately sounded his horn, applied his brakes and swerved to the right in an attempt to avoid the collision.

Defendant's first contention that the trial court erred in its various rulings on the motions for a directed verdict and for judgment n.o.v. raises the question of law of whether there is any evidence standing alone and considered as true, which fairly tends to support the verdict. We are therefore concerned with whether or not there is any evidence together with legitimate inferences to be drawn therefrom in support of plaintiffs' allegations charging defendant with excessive speed, failure to keep a proper lookout ahead and failure to apply his brakes. From an examination of the record it appears that the evidence with respect to any such

negligence consists wholly in Betty Ann Perry's testimony that defendant's car seemed to be wobbling all over the highway and was going 60 to 70 m.p.h., and the neighbor's testimony that John Richerson stated after the accident that he had missed his brake. This latter testimony was neither impeached nor specifically denied. While Betty Ann Perry's testimony viewed with the balance of her testimony is entitled to little weight in view of her limited opportunity to observe the conditions she testified about, nonetheless it stands in the record, and for the purposes of resolving the issues raised by defendant's motions for a directed verdict and for judgment notwithstanding the verdict is not to be viewed in terms of its credibility or reasonableness. In addition, there was evidence, photographic as well as oral, that the private drive was clearly visible for a distance of 250 feet west on the highway and testimony that the Perry car stopped at the edge of the pavement before entering the highway. This evidence taken as true created a jury question on defendant's failure to keep a lookout ahead. We therefore must conclude that there is some evidence of defendant's negligence in the record and that the trial court's ruling on such motions by defendant were correct.

Defendants' next contention is that the jury's verdict is against the manifest weight of the evidence both with respect to the complaint and the counterclaim. It is obvious that a significant factual issue of the case is the point of impact. The plaintiffs all testified that the turn

onto the highway had been completed and that their car was struck from behind 30 to 70 feet east of the intersection; the defendant and his passengers insisted that the collision occurred at the intersection. If we were limited to these opposing views there would be no reason to disturb the jury's verdict. But analysis of the testimony on behalf of the plaintiffs raises contradictions and inherent improbabilities. Plaintiffs' non-occurrence witnesses testified that the Perry car came to rest after the collision 30 to 40 feet east of the intersection and that Betty Ann Perry was lying on the highway 15 to 20 feet east of the intersection. It is impossible to rationalize this testimony with plaintiffs' theory of a violent rear-end collision between moving cars 30 to 70 feet east of the intersection. Betty Ann Perry's testimony is rendered physically impossible by her own witnesses for she placed her car prior to impact substantially further from the intersection than her witnesses observed it after the impact, and viewed in the light of testimony by the t wo state patrolmen and the constable that after the accident debris started at the intersection and ran 40 or 50 feet east of the intersection, the improbability of plaintiffs' theory becomes conclusive. This testimony by the three police officers was neither contradicted or impeached on cross-examination. The testimony of all the witnesses apart from the parties themselves as to location of the cars after the impact and the site of the debris is consistent only with

the conclusion that the impact occurred at or near the intersection. Final confirmation of such fact is found in the photographic exhibit of plaintiffs' car showing extensive damage to the left side of the car and left rear end damage, and testimony that the left front of defendant's car was damaged. Such damage to the cars could have resulted only from an oblique angle collision and is wholly inconsistent with plaintiffs' theory of the case. The effect of this conclusion as to point of impact, however, does not apply equally to all the parties. As to plaintiff Betty Ann Perry, it is clear that the verdict in her favor is against the manifest weight of the evidence on the issue of contributory negligence. Yet, there is sufficient evidence of freedom from contributory negligence on the part of her passengers to conclude that the verdicts in their favor on this issue were correct. However, we do not feel that from the conclusion that the impact occurred at or near the intersection it necessarily follows the jury verdict was against the manifest weight of the evidence on the issue of John Richerson's negligence. He testified he first saw the Perry car entering the highway when he was 30 to 40 feet west of the drive. As pointed out, the evidence shows that there was an unobstructed view of the drive from a point 250 feet west of the intersection. There is no evidence that the Perry car "bolted" out of the drive onto the highway. The jury chose to believe plaintiffs' testimony that the

Perry car stopped at the edge of the highway before entering it. Only by invading the jury's province respecting the credibility of the witnesses could we say that the jury's conclusion that John Richerson should have seen the Perry car in time to avoid the collision is against the weight of the evidence. Consequently, the verdict on John Richerson's counterclaim is not against the clear weight of the evidence. From this conclusion as to defendant's negligence, coupled with those respecting the lack of contributory negligence on the part of the Perry car passengers, it follows that the verdicts for these passengers on the issue of weight of the evidence are not erroneous. The converse is likewise true; there is sufficient evidence of Betty Ann Perry's negligence and the Richerson passengers' freedom from contributory negligence to cause us to conclude that the verdicts of "not guilty" on the two counterclaims are against the manifest weight of the evidence.

The defendant next urges that the verdicts must be reversed because of certain instructions given on behalf of the plaintiffs. The first of these instructions is as follows:

> "If you find from the greater weight of the evidence, and under the instructions of the court, that the plaintiffs are entitled to recover, and that they have sustained damages by reason of physical pain and suffering, if any, which were the proximate result of the occurrence in question, then you may arrive at the amount of such damages, if any, from the facts and circumstances proved by the evidence. It is not necessary that any witness

> should have testified to the pecuniary amount of such damages, if any."

Defendant's principal argument against such instruction is that it groups all of the plaintiffs together implying that if the jury feels any one of the plaintiffs should recover then all must necessarily recover. Since in a host-guest joint action against a third party the guest might be entitled to recovery while the host is not, it is clear that their causes of action should not be so identified. But it is the host who benefits from such grouping, not the passengers. Betty Ann Perry's verdict already having been concluded to be against the manifest weight of the evidence, we cannot say that such instruction requires a reversal of the verdicts for the passengers in the Perry car. They were not benefitted by error in submitting such instruction.

Defendants also contend that two other instructions given on plaintiffs' behalf were erroneous. Instruction number 6 instructed the jury as to the standard of care required of Joyce Alsip. It simply stated that if the jury found that she was under the age of 21 years then she was required to use such care as persons of her age, capacity, intelligence and experience would be expected to use. The fault of this instruction was that it could just as easily be applied to the plaintiff-driver, 17 year old Betty Ann Perry as to Joyce Alsip. In addition, as defendant points out, there is no evidence in the record as to Joyce Alsip's age, intelligence or experience. However, the first objection is no longer

significant since the verdict for Betty Ann Perry is to be reversed and remanded on other grounds. The remaining objection would be valid if Joyce Alsip were the sole plaintiff instead of one of several passengers in the Perry car. Under the circumstances of this case the objection loses force since even if she were held to the higher standard of care of the adult passengers, there is no evidence that such standard was not met.

Defendant also objects to number 9 which covered the question of damages recoverable by Joyce Alsip and enumerated various elements of damage including suffering in mind and body, present and future, loss of time and inability to work, and expense of treatment. Defendant argues that Joyce Alsip not having testified, there is therefore nothing in the record on these specific elements of damage to support the jury's verdict for her. Plaintiffs concede that this instruction contains elements upon which no evidence was adduced but argue that such error is harmless inasmuch as no contention has been made that the verdict for Joyce Alsip is excessive. We must agree with this position. The evidence shows Joyce Alsip sufferred an "L" shaped laceration on the right side of her neck; had a portion of the covering of the chin peeled down so that the bone was exposed; her left leg was fractured just above the middle one-third of the thigh and she wore a plaster cast for her thigh extending from the waist to the base of the toes for about eight weeks;

and she now has and will continue to have a slight shortening of the left leg. Quite naturally she sufferred pain. A verdict of $3,420.00 for these injuries cannot be described as excessive. An unblemished record on appeal cannot be insisted upon. This court must concern itself with the substantiality of the error to the end that litigants may at least find an end to litigation if not complete satisfaction therefrom. In this instance we therefore conclude that such instruction, though erroneous, was harmlessly so.

As a guide on the retrial we will comment on the final error urged by defendant, namely, the trial court's ruling sustaining plaintiffs' objection to any evidence of Betty Ann Perry's failure to have a driver's license. The following cases cited by plaintiffs amply support the trial court's ruling: Wilson v. Hobrock, 344 Ill. App. 147, 152; Humbert v. Lowden, 323 Ill. App. 557; Moyer v. Walden W. Shaw Livery Co., 205 Ill. App. 273. It is generally held, as these cases point out, that the failure to have a license has no logical relevance to the issues of negligence or contributory negligence. Defendant attempts, however, to draw a refinement to this established rule by urging that such evidence bears on plaintiff Herbert Alsip's contributory negligence in allowing an unlicensed driver to operate his automobile. However, we feel that even if the evidence were proper for such restricted purpose its effect could not be so confined and would be highly prejudicial to plaintiff Betty Ann Perry.

In addition, the record shows that the defendant was able to introduce direct evidence bearing on Betty Ann Perry's experience as a driver. We therefore find no error in this ruling.

We therefore conclude as follows: the verdicts for Grace Alsip, Joyce Alsip, and Herbert Alsip are affirmed; the verdict of "not guilty" on John Richerson's counter-claim is likewise affirmed; the remaining verdicts, those concerning Betty Ann Perry, Velma Hall, and Betty June Richerson, are reversed and remanded for a new trial.

Judgments affirmed in part and reversed in part, and remanded.

Culbertson, P. J. and Scheineman, J., concur.

Publish Abstract only.

46213, 46214, 46215, 46216 and 46217 (consolidated)

3 I.A.2d 422

CITY OF CHICAGO, Appellant, v. CONNIE LEE, Appellee.	46213 46214 46215 APPEALS FROM
CITY OF CHICAGO, Appellant, v. TOMMY WORKS, Appellee.	MUNICIPAL COURT OF CHICAGO 46216 46217

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The City of Chicago, plaintiff, appeals from judgments in favor of the defendants in five separate actions (three against defendant Lee and two against defendant Works) for violation of certain ordinances of the City of Chicago. The suits against defendant Lee were consolidated and tried jointly, as were the suits against Works.

The cases were disposed of upon separate motions to suppress the evidence because of the unlawful entry of the police into a room in the New Bedford Hotel in Chicago occupied by Lee and the unlawful arrest of each of the defendants. Works made an additional motion to quash the arrest. The only evidence heard on these motions was the testimony of Russell Burton, a police officer of the City of Chicago. He testified in each consolidated case, and as his testimony in the Works case was more complete it was also permitted to apply to the Lee case. Separate reports of the proceedings were

filed by the defendants. The motions were sustained as to each defendant and the defendants discharged. On appeal by plaintiff the cases were consolidated in this court for hearing. The defendants have not followed the appeal.

The evidence shows that Burton saw a man named Fletcher get into a taxicab on west Madison street driven by Robert Rose, whom Burton knew to be a panderer; that Fletcher was driven to the Wedgewood Hotel on the south side; Rose entered the hotel and returned to the taxicab with defendant Lee; she entered the cab and the party then drove to a restaurant on west Madison street where Fletcher, Lee and Rose had something to eat; Fletcher wrote on what appeared to be three traveler's checks and turned them over to Rose; the party then drove to the New Bedford Hotel, Fletcher and Lee entered, went to the desk and did some writing and were then taken to a room on the second floor; shortly afterwards Officer Burton entered the hotel and asked where Fletcher and Lee, the last couple to enter, were located; he went with the clerk of the hotel to room 237, knocked on the door, told the occupants to open the door, stating that he was the manager; the door was shortly opened by Fletcher; Lee did not talk to the officer; Fletcher conversed freely, but as we hold that the entry into the room and the arrest of the defendant Lee were unlawful, we need not recite what Burton saw or heard. Burton testified that he did not hear anything in the room before entering, he did not

know defendant Lee at the time he arrested her, there was no violation of the law at the time and he had no knowledge that she had "committed any crime against the State of Illinois or the ordinances of the City of Chicago."

In respect to Works, Burton testified that neither before nor after he entered the New Bedford Hotel did Works commit a crime in his presence; that Works had told him he had taken Lee and Fletcher to room 237 and that he had brought Lee with different and other men on several occasions within the preceding couple of weeks to different rooms where they stayed but a short time; that he then placed Works under arrest.

Burton later swore to complaints charging Lee with soliciting "to prostitution upon the streets of Chicago or other public places," in violation of section 5, chapter 192 of the Municipal Code; with being "an inmate of a house of ill fame or assignation or place used for the practice of prostitution or lewdness," in violation of section 1 of chapter 192 of the Municipal Code; and that Lee "was found loitering about in a hotel, bar-room, dram shop, gambling house, or disorderly house, or wandering about the streets either by night or by day without any lawful means of support, or without being able to give satisfactory account of himself," in violation of chapter 193, section 1, sub-section 11 of the Municipal Code. The complaints against Works charge that he "did

keep or maintain a house of ill fame or assignation or place for the practice of fornication, prostitution or lewdness," in violation of section 1, chapter 192 of the Municipal Code, and that he was "found loitering about in a hotel, bar-room, dram shop, gambling house, or disorderly house, or wandering about the streets either by night or day without any lawful means of support, or without being able to give satisfactory account of himself," in violation of subsection 11, section 1, chapter 193 of the Municipal Code.

Plaintiff contends that an action for the recovery of penalties for the violation of city ordinances is a proceeding of a civil nature in which a motion to suppress evidence will not lie. This contention is answered adversely to plaintiff in our opinion in the cases of City of Chicago v. Lord, etc. (Nos. 46231 and 46232, consolidated), filed concurrently with this opinion.

Plaintiff further contends that if the motion to suppress is proper in cases of this character, the arrests were lawfully made and the evidence lawfully obtained. The statute permitting arrests without warrant by police officers (Ill. Rev. Stat. 1953, chap. 38, par. 657) in so far as the same is pertinent to this appeal, reads: "An arrest may be made by an officer *** without warrant *** when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." The

violation of a municipal ordinance subjecting the offender to the penalty of a fine is a "criminal offense" within the contemplation of this staute. People v. Edge, 406 Ill. 490. The right of a police officer to arrest for the violation of a city ordinance committed or attempted in his presence is not before us. Burton specifically stated that neither Lee nor Works committed any offense in his presence. There is nothing in the testimony of Burton tending to show that either of the defendants was guilty of any of the offenses charged against them. This is so evident that we need not further analyze the testimony in relation to the particular charges. Entrance into the room occupied by Connie Lee was obtained by deception--a representation of the police officer that he was the manager of the hotel. The entry was similar to that obtained by the police to the apartment of the defendant Albea when they represented themselves as agents of the Western Union. People v. Albea, 2 Ill.2d 317. For further discussion of illegal searches, see our opinion in City of Chicago v. Lord, etc., supra.

The judgments are affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

177 A

46310 3 I.A.2d 477

MABEL A. FRANKEL, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
MARGARET HALLEMAN, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for construction of a will and for approval of an account made as executrix under the will of the life tenant. The issues were referred to a master whose report was confirmed by the Chancellor. The decree granted plaintiff the relief prayed for and charged plaintiff's attorney's fees against the estate. Defendant Margaret Halleman has appealed.

Andrew H. Halleman died testate in 1924. In paragraph 4 of his will he left his real and personal property to his wife Alice M. Halleman for life with remainder to plaintiff, his daughter, and Edward J. Halleman his adopted grandson. By codicil it was provided that in the event of the death of either remainderman, without issue, prior to the death of testator or life tenant, the interest of the one "so dying" should go to the survivor and Andrew L. Halleman, the testator's son, share and share alike.

In 1942 Andrew L. Halleman died. He left surviving him his widow Margaret Halleman and three children. At his death both Edward J. Halleman and the life tenant were living. In 1944

Edward J. Halleman the adopted grandson died without issue. At his death the life tenant was living. She died testate April 4, 1948 and plaintiff is executrix of her estate.

Plaintiff asked the court to determine whether the interest of Andrew L. Halleman passed to his widow under the residuary clause of his will or as intestate property to defendants, his widow and children. The answer denied the provisions of the will and codicil needed construction stating that the children of Andrew L. Halleman had assigned any interest they might have had to their mother, Margaret Halleman.

The decree found the court had jurisdiction and construed the will and codicil so that the interest of Edward J. Halleman terminated at his death and passed one half to plaintiff and one half to defendant Margaret Halleman under the residuary clause in Andrew L. Halleman's will. The court directed that after paying an $8,000.00 preferential distribution to plaintiff the balance of the personal estate of Andrew H. Halleman should be distributed 3/4 to plaintiff and 1/4 to Margaret Halleman. Plaintiff's attorney's fees were ordered paid from the estate.

The Chancellor presumably decided that there was a fair need of construction. The question on this phase of the case is whether the court had jurisdiction to construe the will. It is conceded that if there was

jurisdiction the fees were properly charged to the estate.

At the death of Andrew H. Halleman the remainder interest of plaintiff and Edward vested in them. At the time of the death of Andrew L. Halleman both Edward and the life tenant were alive. At his death his will became effective. Did whatever interest he may have had terminate at his death? If so who was entitled to that interest? If not, was his interest as contingent remainderman transferable so as to pass to his wife under the will? If not who was entitled to his interest? We think questions like these could well have arisen in the mind of the executrix to justify doubt and uncertainty as to her course of action. We cannot say that the fact that her children made the assignment to defendant necessarily removed the basis for plaintiff's uncertainty. We think that there was justification for the Chancellor taking jurisdiction to construe the will. Sherman v. Flack, 283 Ill. 457, 459-60.

The only case cited by the defendant is Dyslin v. Wolfe, 347 Ill. App. 80 (2d Dist.). That case passed on a question of allowance of fees where the need for construction was admitted. The case is not helpful on the jurisdiction question.

The defendant contends that since the Probate Court was in the process of administering the estate of the life tenant it therefore had exclusive jurisdiction in this matter. We shall assume, but not decide, that the

record shows defendant filed a claim in the Probate Court. However, in Murphy v. Fox, 334 Ill. App. 7, 15 (3d Dist.), the court held that even when an estate is being administered in the Probate Court, the Circuit Court has jurisdiction to construe the will. Accord, Bowers v. Webb, 339 Ill. App. 14, 22-25; Ill. Rev. Stat. 1953, Chap. 22, §50; Chap. 3, § 359.

The court had jurisdiction to construe the will and to allow the fees. The correctness of the construction and amount of the fees are not questioned.

The decree is affirmed.

AFFIRMED.

LEWE, J., AND FEINBERG, J., CONCUR.

178 A

3 I.A.2d 478

46331

HARRY PRINCE, Appellant, v. CORNELL BUILDING COMPANY, a corporation, M. A. ROSENTHAL, GEORGE W. GORDON, NORMAN ASHER, M. C. KUEHN, H. W. SCHLOSS, NATHAN F. WALLACH, LEO WALLACH, ABRAM N. PRITZKER and LOUIS SUSMAN, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing his second amended complaint on the ground that it fails to state a cause of action. The allegations of the complaint are substantially as follows:

The defendant Cornell Building Company, a corporation, hereinafter called "the corporation" was organized in November 1935 pursuant to a decree approving a plan of reorganization entered in the United States District Court under Section 77B of the Bankruptcy Act for the purpose of acquiring the title of the debtor. The corporation, in accordance with the plan of reorganization, authorized the issuance of 8600 shares of common capital stock without par value and the exchange of shares of capital stock in the corporation at a fixed ratio for the unsubordinated bonds of the debtor in the sum of $950,000. The decree also provided for the establishment of a voting trust naming three trustees and designated the Securities Service Corporation to act as depositary and agent of the trustees. M. A. Rosenthal, M. C. Kuehn, George

W. Gordon and H. W. Schloss, named as defendants, are shareholders, officers and directors of the Securities Service Corporation. From the inception of the reorganization of the corporation the Securities Service Corporation, through its officers, participated in the management and control of the premises involved and, as agent of the majority shareholders, has been the "instrumentality" through which they bought shares of stock and "rigged" the market. The corporation operated the premises consisting of an apartment building located on the south side of the City of Chicago until December 1946 when it entered into a lease with Nathan F. Wallach, Leo Wallach, Louis Susman and Abram N. Pritzker, copartners doing business as Carolan Hotel Not Inc. This lease, which expires on November 30, 1956, provides for a fixed minimum annual rent of $34,500 and one-third of the gross rental receipts in excess of $122,000.

There are also allegations that: Susman, the Wallachs, and Pritzker, owners and holders of more than two-thirds of the shares of stock of the corporation, formed themselves into "a ruling clique" to control and acquire all of the stock of the corporation at an "artifically depressed valuation." They caused to be elected Rosenthal, Kuehn, Schloss, and one Norman Asher the son-in-law of Susman, as directors of the corporation. In June 1951 the corporation entered into a new lease with the Carolan Hotel Not Inc., which expires November 1959, at a grossly inadequate rental. At the time the corporation made the new lease with the Carolan

Hotel Not Inc. certain minority shareholders of the corporation proposed a lease "guaranteeing" to the corporation a larger net income. This offer was rejected. Because of the domination exercised by the majority shareholders over the board of directors of the corporation no action could be taken by the corporation without their consent and any request made by the plaintiff upon the officers or board of directors would be "futile and unavailing." The complaint also alleges that the premises here in controversy could have been sold in the present market at a fair price.

The second amended complaint concludes with a prayer asking that the court determine the number of shares acquired by the majority shareholders and find that they were acquired for the use and benefit of the corporation; that the leases executed in December 1946 and June 1951 be declared null and void; that the premises in question be sold; that the copartners account to the corporation for all moneys wrongfully collected; and that a receiver be appointed.

In support of his contention that the second amended complaint states a cause of action, plaintiff says that it shows a preconceived plan to siphon off the corporate profits for the benefit of the dominant shareholders. From the allegations of the second amended complaint it appears that all the shareholders, officers and directors of the Securities Service Corporation have served since the Securities Service Corporation was designated and approved by the District Court in the reorganization proceedings and that four of the five

directors and officers of the corporation are the same persons who have managed the corporation since 1935. Mr. Asher was elected a director later.

It appears that plaintiff acquired five shares of stock in the corporation on June 23, 1949 and became the owner of an additional sixty shares on March 7, 1952. The corporation leased the premises to Carolan Hotel Not Inc. in December 1946. In Goldberg v. Ball, 305 Ill. App. 273, this court held that a minority stockholder cannot complain of acts of mismanagement prior to his acquisition of stock. Since plaintiff secured his original stock after the premises were leased in 1946 and the additional stock after the second lease in 1951 he is precluded from maintaining his suit for any alleged acts of mismanagement which took place before he acquired the stock.

This complaint incorporates Exhibit A by reference. The exhibit, however, is not attached to the complaint. There are allegations in the complaint that the exhibit shows operating losses of the corporation for the years 1948, 1949 and 1950. From a reading of the complaint we cannot determine whether the results of the operation of the premises under the new lease executed in 1951 were less favorable to the corporation than under the terms of the original lease, or whether the alleged misconduct complained of occurred before or after plaintiff acquired his stock. In the absence of allegations of fact showing that plaintiff and other shareholders have been substantially affected by fraud or illegal conduct on the part of the defendants, the giving of the

second lease rested in the sound discretion of the directors of the corporation. (Greenfield v. 5222 Harper Avenue Building Corporation, 351 Ill. App. 375.) In our view such allegations of fact are lacking. Moreover, the corporation was justified in rejecting the offer of the proposed lease by minority stockholders alleged to contain more favorable terms, for the reason that the original lease did not expire until November 30, 1956. Nor is there any valid ground alleged or authorities cited which would warrant the court to direct a sale of the premises in controversy as prayed for in the complaint.

The second amended complaint repeatedly charges, in general terms, that the majority shareholders of the corporation engaged in a conspiracy to defraud the plaintiff and other minority shareholders, and other acts of mismanagement. These allegations, being unsupported by facts, are conclusions. See Owens v. Green, 400 Ill. 380. Disregarding the conclusions and taking the allegations of fact in the complaint as being true we are of the opinion that the plaintiff has failed to state a cause of action.

For the reasons given, the judgment order is affirmed.

JUDGMENT ORDER AFFIRMED.

KILEY, P.J. AND FEINBERG, J. CONCUR.

46342

LOUIS SANCHEZ AND FRED L. SANCHEZ, a minor, by LOUIS SANCHEZ, his father and next friend, Appellees, v. JOSEPH SOBIESKI, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his motion to vacate a default judgment.

June 5, 1951 plaintiffs filed a complaint alleging that defendant negligently and wilfully drove his automobile into an automobile operated by Fred L. Sanchez, a minor, and owned by his father Louis Sanchez. As a result of the collision Fred L. Sanchez sustained personal injuries and the automobile of Louis Sanchez was damaged. July 24, 1951 summons was served upon the defendant. August 7, 1953 judgments were entered against him and in favor of Louis Sanchez for $350 and in favor of Fred L. Sanchez for $1500.

October 30, 1953 defendant filed a written motion and affidavit in support thereof, to vacate the judgments, alleging among other things that on July 25, 1951 the defendant deposited the summons served upon him the preceding day in an envelope with sufficient United States postage, addressed to one Joseph Blumberg, an insurance broker from whom defendant had purchased public liability insurance; that about October 3, 1953 defendant was informed by Blumberg that the summons was never received

by him; that the insurance company which issued the policy to defendant through Blumberg was placed in liquidation by the Director of Insurance of the State of New York on May 2, 1951; and that defendant had received no knowledge of the liquidation of the insurance company until October 3, 1953.

Defendant contends that the trial court abused its discretion in denying his motion. Under similar circumstances the precise question here presented was determined adversely to defendants by this court in Wagner v. Sulka, 336 Ill. App. 101, and in the recent case of Chmielewski v. Marich, 350 Ill. App. 370 Aff'd 2 Ill. 2nd 568. In Wagner v. Sulka we said at page 105: "We are of the opinion that merely depositing a summons in the mail to an insurance broker upon the assumption that he in turn would deliver the summons to the insurance company by whom the policy was issued and that they would provide for a proper defense is not the kind of diligence required in such a situation." Moreover, we held that the burden was upon the defendant to make inquiry as to whether or not the summons had reached the hands of those under obligation to file an appearance and to have had some reasonable assurance a defense had been made. In Chmielewski v. Marich, 350 Ill. App. 379, the facts alleged in the petition to vacate the judgment averred that the defendant delivered the summons to an insurance agent who had furnished insurance protection

for the property in question; that the agent had assured them the matter would be properly taken care of by the insurance company; and that they relied upon the insurance and did not discover until after the execution was served that a judgment had been entered against them by default. In that case we concluded that, in the absence of an averment in the petition that the defendants had made an inquiry between the time of delivery of the summons to the insurance agent and the discovery of the entry of judgment by default, the petition to vacate was insufficient to justify the trial court in setting aside the judgment.

Finally defendant contends that the court entered a judgment on defendant's default without requiring the plaintiff to file an affidavit showing that defendant was not in military service under the provisions of Section 200(1) of the Soldiers and Sailors Civil Relief Act of 1940, as amended (54 Stat. 1180, 50 App. U.S.C.A. Sec. 520(1)). The foregoing act is for the exclusive benefit of the Serviceman, who alone can take advantage of it, and then only upon the showing that his interest has been deleteriously affected. In the instant case defendant does not aver that he was in the military service at the time the judgment was entered. Even so, the default judgment taken without the military affidavit is not thereby rendered void but merely voidable at the instance of the Serviceman upon proper showing of

prejudice and injury. See Mims Bros. v. N. A. James, Inc., 174 SW 2d 276.

For the reasons stated, the judgments are affirmed.

JUDGMENTS AFFIRMED.

KILEY, P. J., AND FEINBERG, J., CONCUR.

Copies of abstracts and briefs sent you with first opinion filed.

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G nda No. 11

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT 3 I.A.2d 479

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May Term, A.D.,1954

ALLEN O. STEISKAL, a minor, by MARY L. STEISKAL, his mother and next friend, and SANDRA STEISKAL, a minor, by ELEANOR KUESTER, her mother and next friend, Plaintiffs-Appellants, vs. CONNIE STRAUS, LALLO CIALONI, MARCO CELLITTI, EDNA MARGARET QUINN, FOUR POINTS, INC., a Corporation, FLOYD PETERSON, MARGE PETERSON, and KATHRYN HEWITT, Defendants-Appellees.	Appeal from the Circuit Court of McHenry County.

Dove, J.

The complaint in this case was filed in the circuit court of McHenry County by Allen O. Steiskal and Sandra Steiskal, minor children of Frank Joseph Steiskal, deceased, to recover, under the provisions of the Dram Shop Act, damages they had suffered in their means of support by reason of the death of their said father, Frank Joseph Steiskal. It was alleged that the defendants sold or gave to one Richard Farrell McGill intoxicating liquor, which resulted in his intoxication and, while so intoxicated he (McGill) drove an automobile at a high

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Abstract

Gen. No. 10691 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT 3 I.A.2d 479

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May Term, A.D.,1954

ALLEN O. STEISKAL, a minor, by MARY L. STEISKAL, his mother and next friend, and SANDRA STEISKAL, a minor, by ELEANOR KUESTER, her mother and next friend, Plaintiffs-Appellants, vs. CONNIE STRAUS, LALLO CIALONI, MARCO CELLITTI, EDNA MARGARET QUINN, FOUR POINTS, INC., a Corporation, FLOYD PETERSON, MARGE PETERSON, and KATHRYN HEWITT, Defendants-Appellees.	Appeal from the Circuit Court of McHenry County.

Dove, J.

The complaint in this case was filed in the circuit court of McHenry County by Allen O. Steiskal and Sandra Steiskal, minor children of Frank Joseph Steiskal, deceased, to recover, under the provisions of the Dram Shop Act, damages they had suffered in their means of support by reason of the death of their said father, Frank Joseph Steiskal. It was alleged that the defendants sold or gave to one Richard Farrell McGill intoxicating liquor, which resulted in his intoxication and, while so intoxicated he (McGill) drove an automobile at a high

Nov. 26, 1927. Agenda No. 14.

IN THE

APPELLATE COURT OF ILLINOIS

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ABSTRACT

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May term, A.D. 1927.

ALLEN O. STEISKAL, a minor, by FRANK L. STEISKAL, his mother and next friend, and ANTONIA STEISKAL, a minor, by [illegible] KUBATIN, her mother and next friend, Plaintiffs-appellants, vs. COONEY BROS., LARGO ORCHARD, MACCO CONCRETE, THE MORNAGH QUINN, BOON POLICE, INC., a Corporation, [illegible], MARK [illegible] SON, and [illegible] HEVITT, Defendants-Appellees.	Appeal from the Circuit Court of McHenry County.

Dove, J.

The complaint in this case was filed in the circuit court of McHenry County by Allen O. Steiskal and Antonia Steiskal, minor children of Frank Joseph Steiskal, deceased, to recover under the provisions of the Dram Shop Act, damages the, had suffered in their means of support by reason of the death of their said father, Frank Joseph Steiskal. It was alleged that the defendants sold or gave to one Richard Farrell Mullin intoxicating liquor, which resulted in his intoxication and, while so intoxicated he (Mullin) drove an automobile at a high

and reckless rate of speed and without keeping a lookout for other vehicles and struck another automobile, throwing it against said Frank Joseph Steiskal, and, as a result thereof, Frank Joseph Steiskal suffered injuries from which he died on November 26, 1948. Each plaintiff demanded judgment against all the defendants in the sum of $50,000.00. The complaint was filed on February 5, 1952, and set forth the provisions of the statute as it existed at the time of the death of Frank Joseph Steiskal (Ill. Rev. Stat., 1947, chap. 43, sec. 135). A motion to dismiss the complaint was filed by the defendants, which motion was sustained and the complaint stricken. From an appropriate final judgment dismissing the complaint, plaintiffs appeal.

At the time this cause of action accrued, November 20, 1948, the Dram Shop Act didn't limit the amount of recovery nor did it contain any provision as to the time the action should be commenced, but on August 10, 1949, the Act was amended. By this amendment, the legislature struck out the words "for all damages sustained and for exemplary damages" and provided that recovery under the Act for injury to the person or property of any person or for loss of means of support resulting from the death or injury of any person should not exceed $15,000.00 and provided that every action under said Act should be commenced within two years next after the cause of action accrued.

The instant cause of action accrued November 26, 1948. The complaint in this cause was filed on February 5, 1952. The only question presented for our determination upon this record is whether the 1949 amendment to the Dram Shop Act is or is not retroactive.

and reckless rate of speed and without keeping a lookout for other vehicles and street motor automobile, thereby it against said Frank Joseph Stelakal, and, as a result thereof, Frank Joseph Stelakal suffered injuries from which he died on November 26, 1948. Said plaintiff demanded judgment against all the defendants in the sum of $50,000.00. The complaint was filed on February 5, 1952, and set forth the provisions of the statute as it existed at the time of the death of Frank Joseph Stelakal (Ill. Rev. Stat., 1947, chap. 3, sec. 121). A motion to dismiss the complaint was filed by the defendants, which motion was sustained and the complaint dismissed. From an appropriate final judgment dismissing the complaint, plaintiff appeal.

At the time this cause of action accrued, November 26, 1948, the Dram Shop Act didn't limit the amount of recovery nor did it contain any provision as to the time the action should be commenced, but on August 10, 1949, the Act was amended. By this amendment, the legislature struck out the words "for all damages sustained and for exemplary damages" and provided that recovery under the Act for injury to the person or property of any person or for loss of means of support resulting from the death or injury of any person should not exceed $15,000.00 and provided that every action under said Act should be commenced within two years next after the cause of action accrued.

The instant cause of action accrued November 26, 1948. The complaint in this cause was filed on February 5, 1952. The only question presented for our determination upon this record is whether the 1949 amendment to the Dram Shop Act is or is not retroactive.

The trial court held that it was, following the case of Fourt v. DeLazzer, 348 Ill. App. 191. Since then the Appellate Court of the First District reached a similar conclusion (Orlicki v. McCarthy, 2 Ill. App. (2d) 182). A certificate of importance was granted in that case, and the Supreme Court arrived at the same conclusion and affirmed the judgment of the appellate court. The opinion of the Supreme Court in Orlicki v. McCarthy, General No. 33295, has not been published but was filed on November 18,1954.

The judgment of the Circuit Court of McHenry County is, therefore, affirmed.

Judgment affirmed.

The trial court held that it was, following the case of Court v. Ulbaker, 36 Ill. app. 191. Since then the appellate Court of the first District reversed a similar conclusion (Orlicki v. Moberly, 2 Ill. App. (2d) 182). A certificate of importance was granted in that case, and the Supreme Court arrived at the same conclusion and affirmed the judgment of the appellate court. The opinion of the Supreme Court in Orlicki v. Moberly, General No. 35245, has not been published but was filed on November 18, 1920.

The judgment of the Circuit Court of Kankakee County is, therefore, affirmed.

Judgment affirmed.

Gen. No. 10764 Agenda No. 5

3 I.A.2d 480

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

May Term, A.D. 1954

JOHN H. STROM and IRVIN E. WERNICK d/b/a ACE LAUNDRY COMPANY, Appellants, vs. EARL A. WELDEN d/b/a WELDEN ELECTRIC CO., Appellee.	Appeal from the Circuit Court of Winnebago County.

Dove, J.

On August 22, 1945, Earl A. Welden, doing business as the Welden Electric Company and the Meier Dairy Company, a corporation, executed a lease by the provisions of which the dairy company leased to Welden certain described premises in the City of Rockford to be used by him in connection with his general sign and electric business. The lease covered a period of five years, commencing November 1, 1945, and ending November 1, 1950, and provided for a monthly rent of $90.00, payable in advance. On January 3, 1947, the dairy company sold the premises covered by the lease to Irvin E. Wernick and John H. Strom and assigned to them its interest in this lease.

Gen. No. 10754

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

May term, A.D. 1926

JOHN H. STROM and IRVING S. WERRICK d/b/a ICE DEPOT COMPANY, Appellants.	Appeal from the
vs.	Circuit Court of
EARL A. WELDON d/b/a WELDON ELECTRIC CO., Appellee.	Winnebago County.

Dove, J.

On August 22, 1925, Earl A. Weldon, doing business as the Weldon Electric Company and the Model Dairy Company, a corporation, executed a lease by the provisions of which the dairy company leased to Weldon certain described premises in the City of Rockford to be used by him in connection with his general sign and electric business. The lease covered a period of five years, commencing November 1, 1925, and ending November 1, 1930, and provided for a monthly rent of $90.00, payable in advance. On January 3, 1927, the dairy company sold the premises covered by the lease to Irvin S. Werrick and John H. Strom and assigned to them its interest in this lease.

The record discloses that in the spring of 1950 Mr. Strom, one of the owners of the building, advised the defendant, Welden, that upon the expiration of the lease on November 1st of that year that the defendant would be required to vacate the premises. This angered Welden, and he informed Strom that he didn't think it was fair, as he had occupied the building for ten years, and that if he was compelled to vacate the building he would destroy it. On July 30, 1950, Mr. Wernick, the other owner of the building, learned that Welden was moving from the premises, but when he went to the building, he found the door locked. The next day he returned. The back door was open and, according to his testimony, the interior of the building "looked like a cyclone had hit it; that the ceilings were torn down; the plaster torn off, the electrical conduits torn out of the switch boxes and there was nothing left on the walls." The testimony of this witness, as abstracted, then continued: "The electrical boxes were half torn off and there was electricity in the wires and sparks flying all over. They didn't even shut the electricity off. The fuses were out. We tried to figure out how there could be live wires with the fuses gone and had the Electric Company trace it. The furnace was completely torn apart and scattered over the floor. I had been in the building a week before Welden moved out and it was in perfect condition, a nice front on the showroom with partitions, an office, and back of the partition was a workshop. There were light fixtures and a furnace with pipes going to each room and a blower with a stoker. The partitions

The record discloses that in the spring of 1950 Mr. Stroh, one of the owners of the building, advised the defendant, Weiden, that upon the expiration of the lease on November 1st of that year that the defendant would be required to vacate the premises. This angered Weiden, and he informed Stroh that he didn't think it was fair. He had occupied the building for ten years, and that if he was compelled to vacate the building he would destroy it. On July 30, 1950, Mr. Wernick, the other owner of the building, learned that Weiden was moving from the premises, but when he went to the building, he found the door locked. The next day he returned. The back door was open and, according to his testimony, the interior of the building "looked like a cyclone had hit it; that the ceilings were torn down; the plaster torn off, the electrical conduits torn out of the switch boxes and there was nothing left on the walls." The testimony of this witness, as abbreviated, then continues:

"The electrical boxes were all torn off and there was electricity in the wires and sparks flying all over. They didn't even shut the electricity off. The fuses were out. We tried to figure out how there could be live wires with the fuses gone and had the Electric Company trace it. The furnace was completely torn apart and scattered over the floor. I had been in the building a week before Weiden moved out and it was in perfect condition, a nice front on the showroom with partitions, an office, and back of the partition was a workshop. There were light fixtures and a furnace with pipes going to each room and a flower with a stoker. The partitions

were bolted to the floor and ceiling and the ceiling was nailed to the roof. After Mr. Welden moved out, we cleaned up the building and got rid of all the debris, finished taking the electrical conduits down, as everything had to be taken out because of the condition in which they were left. After we got it cleaned up, we hired men to do the carpentry work in order to get the place back in shape, a new ceiling, new partitions, new flooring, and electrical work. We didn't replace the same type of furnace, but put in a ceiling blower. The furnace was a regular hand type furnace bolted and cemented to the floor and the electrical fixtures were bolted to the walls and partitions. It took a couple of months for reconstruction."

After the plaintiffs had obtained possession of their building, they filed the instant complaint against Welden to recover the damage they alleged they sustained as a result of his conduct in destroying and injuring their property. The complaint consisted of two counts. The first count, after setting forth the execution of the lease, the assignment thereof to the plaintiffs and that, according to the terms of the lease, the lessee should yield up the premises in as good a condition as when entered upon, then charged that the defendant moved from the premises on or about August 1, 1950, and that he removed all partitions, wiring, plastering, interior walls, fixtures, furnace, ceiling, and generally gutted the building. The second count contained the same allegations and charged that on or about August 1, 1950, the defendant wilfully, wantonly, and maliciously removed the partitions,

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electrical wiring, plastering, interior wall fixtures, furnace and ceiling, all of which the complaint alleged were a part of the building and permanently attached thereto. By his answer, the defendant admitted the execution of the lease, the assignment thereof, and that by its provisions the building was to be yielded up in as good a condition as when entered upon but denied that he moved from the building on August 1, 1950, and alleged that he was barred from again entering the premises at that time, although the lease had not expired. The answer denied that the building was damaged or gutted and denied any wilful, wanton or malicious conduct. The issues thus made were submitted to a jury, resulting in a verdict in favor of the plaintiffs and against the defendant for $300.00. After overruling a motion for a new trial made by the plaintiffs, the trial court rendered judgment on the verdict, and plaintiffs appeal.

We have read the evidence, as abstracted, and have examined the several exhibits offered and admitted in evidence, including the pictures which are found in the record. Numerous checks were offered and admitted in evidence without objection, aggregating $3,273.64, showing payments made by appellants to various parties for carpenter work, painting, electrical wiring, lumber and other building materials. The evidence is that these expenditures were necessary in order to restore the building to the condition it was in just prior to the time appellee moved out. The evidence fully sustains the finding of the jury that appellants sustained damages and were entitled to recover, but the amount of the jury's verdict cannot be reconciled with the evidence found in this record.

electrical wiring, plastering, interior wall fixtures, trusses and ceiling, all of which the complaint alleged were a part of the building and permanently attached thereto. By its answer, the defendant admitted the erection of the lease, the assignment thereof, and that by its provisions the building was to be yielded up in as good a condition as when entered upon but denied that he moved from the building on August 1, 1920, and alleged that he was barred from again entering the premises at that time, although the lease had not expired. The answer denied that the building was damaged or gutted and denied any willful, wanton or malicious conduct. The issues thus made were submitted to a jury, resulting in a verdict in favor of the plaintiffs and against the defendant for $300.00. After overruling a motion for a new trial made by the plaintiffs, the trial court rendered judgment on the verdict, and plaintiffs appeal.

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When the evidence discloses that plaintiffs are entitled to recover substantial damages, a verdict for an amount considerably less than the damages proved should be set aside and a new trial awarded. The verdict of the jury in the instant case is wholly inadequate, and when that appears, it is error for the trial court to deny a new trial. (Rulison v. Sprout and Davis, Inc., 330 Ill. App. 621; Byalos v. Matheson, 328 Ill. 269, 272; Montgomery v. Simon, 309 Ill. App. 516; Hamilton v. P.C.C. and St. L. Ry. Company, 104 Ill. App. 207; Vose v. Central Illinois Public Service Co., 286 Ill. 519; Paul v. Leyenberger, 17 Ill. App. 167).

Appellee filed no appearance in this court, and we have not had the benefit of a brief or any suggestions in support of the judgment which we are called upon to review. The trial court erred in not sustaining appellants' motion for a new trial, and for that error the judgment is reversed and the cause remanded to the Circuit Court of Winnebago County for a new trial.

Reversed and remanded.

Wolfe P. J. Concurs
Anderson J. Took no part.

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Reversed and remanded.

Mr. Justice F. H. Scheman,
Mr. Justice Wilson and Mr. Justice Dove.

4 303

Abstract

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Gen. No. 10769 Agenda No. 8

3 I.A.2d 480

In the

APPELLATE COURT OF ILLINOIS

- - -

Second District

- - -

October Term, A.D. 1954

Sarafino Eacurco, Plaintiff-Appellant vs. Alex Haddad, Defendant-Appellee	Appeal from the Circuit Court of Winnebago County.

DOVE, J.

The plaintiff, Sarafino Eacurco, was the owner of a dwelling house in Rockford, which he rented to the defendant, Alex Haddad. By this action, plaintiff sought to recover damages for a loss he sustained when his property was damaged by a fire on November 21, 1944, caused by the alleged negligence of the defendant. The issues made by the pleadings were submitted to a jury, which returned a verdict in favor of the plaintiff for $500.00. The plaintiff, insisting that the verdict was inadequate, filed his motion for judgment notwithstanding the verdict for $4024.86, and also filed a motion for a new trial. The trial court denied both motions and rendered judgment on the verdict for $500.00, and plaintiff appeals.

The pleadings and evidence discloses that the defendant operated said dwelling as a rooming and apartment house and

Abstract

Dec. 17, 1926 — Docket No. 4

In the

Appellate Court of Illinois

Second District

October Term, A.D. 1926

Martin Hansen, Plaintiff-Appellant, v. Alex Hadad, Defendant-Appellee	Appeal from the Circuit Court of Winnebago County.

Opin. 1.

The plaintiff, Martin Hansen, was the owner of a dwelling house in Rockford, which he rented to the defendant, Alex Hadad. By this action, plaintiff sought to recover damages for a loss he sustained when his property was damaged by a fire on November 21, 1924, caused by the alleged negligence of the defendant. The issues made by the pleadings were submitted to a jury, which returned a verdict in favor of the plaintiff for $800.00. The plaintiff, insisting that the verdict was inadequate, filed his motion for judgment notwithstanding the verdict for $4000.00, and also filed a motion for a new trial. The trial court denied both motions and rendered judgment on the verdict for $800.00, and plaintiff appealed.

The pleadings and evidence disclosed that the defendant operated said dwelling as a rooming and apartment house and

rented one of the apartments on the second floor to Mary and Eileen King. This apartment consisted of one room with an alcove. On November 21, 1944, either Mary or Eileen King requested defendant to spray their apartment for roaches. Using a hand spray gun filled with a mixture consisting of a commercial preparation and gasoline in equal proportions, the defendant sprayed around the baseboard, doorway and the mold board of the alcove, and then sprayed the drapes and curtains, which hung in the doorway between the alcove and the room. The spraying took about fifteen or twenty minutes and when he had completed, the defendant struck a match to light an unlighted cigar. There was a flash and a fire resulted, which spread from the alcove to the living-room and considerable damage was done, not only to the King Apartment, but to other portions of the dwelling.

Counsel for appellant argue that the verdict of the jury in his favor for $500.00 is inadequate and not supported by the evidence and the trial court therefore erred in denying plaintiff's motion for judgment for $4024.86 notwithstanding the verdict. In the event he was not entitled to a judgment notwithstanding the verdict, counsel insists that he is entitled to have the issues submitted to another jury and that the trial court erred in denying his motion for a new trial.

Counsel for appellee insists that plaintiff is not entitled to recover, because he has been fully paid by two insurance companies; that it was the province of the jury to fix the reasonable amount of plaintiff's loss, and having done so, the plaintiff is concluded thereby. Counsel further insists that the evidence fails to disclose that defendant was guilty of any negligence and that it was the failure of the fire-fighting

equipment of the city which makes appellant's loss so severe.

The record discloses that George Bienemann was the only person who testified as to the repairs made or amount of damage to the plaintiff's property occasioned by this fire. He testified that he was a building contractor in Rockford and had been since 1926; that he was requested by the plaintiff on November 21, 1944 to go to the house which had been burned and that he did so; that he went through the whole building, made an examination of the house and found that about 80% of the roof structure had been burned or charred and that the various apartments were soaked from water and the plaster damaged. This witness prepared an estimate of fire loss, which was offered and admitted in evidence over appellee's objection. Another exhibit which is referred to by this witness, as a "bill for fire loss repairs", was also offered, and over appellee's objection, admitted in evidence. This witness testified that the repairs were completed by January 14th; that the electrical repairs were not included in the estimate, but included in the bill; that the amount of the bill was paid by the plaintiff and that the amount of the charges was the reasonable charges for the work done. Upon cross-examination of this witness, he stated he "thought" that the electrical work, which was done, was a fire loss repair as it was done in the area that was affected by the fire; that he sublet, to other contractors, the electrical work, plumbing, lathing, plastering, shades and decorations; that the painting was done by the owner and the witness did the sheathing, flooring, side wall shingling, roofing, studs, rafters and joists and furnished the hardware and nails, and that the contractors profit was in the neighborhood of 10% on the sublet items.

equipment of the car which Smith plaintiff's type be severe.

The report discovers that Smith's testimony and the only witness who testified as to the material time or relevant to damage to the plaintiff's property consisting of this car. He testifies that he was a building contractor in Montreal and had been since 1936; that he was re-called by the plaintiff on November 21, 1941 at 4:00 p.m. to the house where he had been called and that he did so; that he went through the usual ritual, made an examination of the house and found that a great deal of the roof structure had been burned or damaged and that the various statements were needed from other and the material damage. This witness testified as witness of fact that, which was offered and admitted in evidence over defendant's objection. Another subject which is referred to by this witness, as a "bill for time lost repairs", was also offered and over defendant's objection admitted in evidence. This witness testified that the repairs were completed on January 1st; that the electrical repairs were not included in the repairs, but included in the bill; that the amount of the bill was paid by the plaintiff and that the amount of the damage was not reasonable charge for the work done. Upon cross-examination of this witness, he stated he "thought" that his estimated cost, which was done, was a fair and reasonable one in the sense that was offered by the firm; that he thought, in other contractors, the electrical work, plumbing, lathing, plastering, painting and decorating; that the painting was done by his crew and the witness did the wallpaper, flooring, like well, carpentry, roofing, stucco, fixtures and repairs and furnished the evidence for the bill and the contractors profit was in the bill of plaintiff on the insurer item.

Neither the estimate of loss or the repair bill have been abstracted. We have gone to the record, however, and examined them and are clearly of the opinion that the trial court did not err in overruling appellant's motion for judgment for $4024.86 notwithstanding the verdict for $500.00 in his favor. The evidence found in this record would not justify any such judgment. Appellant was, however, entitled to recover a reasonable amount for the damages he sustained as a result of appellee's negligence and there is no evidence in the record upon which the verdict of the jury can be based. It is inadequate and where it so appears it is error for the trial court to deny a new trial. (Montgomery vs. Simon, 309 Ill. App. 516, 33 N.E. (2) 641; Miller vs. Chicago Transit Authority, 3 Ill. App. (2) 223.)

There is no merit in any of the contentions of appellee. The evidence fully sustains the finding of the jury that the plaintiff sustained damages; that the defendant was negligent and that his negligence was the proximate cause of the damage which appellant sustained. As early as the case of American Express Company vs. Haggard, 37 Ill. 465, it was held (p. 472) that if insured property is destroyed by the act of a wrong doer, though the insurance company may have paid the loss, the owner of the property may still sue the wrong doer and the recovery will be for the benefit of the insurance company. (Byalos vs. Matheson, 328 Ill. 269, 272; Vose vs. Central Illinois Public Service Company, 286 Ill. 519.)

The verdict of the jury being wholly inadequate, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Wolfe P. J. - Concurs.
Anderson J. - Took no part.

46269

STANLEY A. NELSON, Appellee,	)	APPEAL FROM SUPERIOR COURT,
v.	)	COOK COUNTY.
R. BERRY ROOFING CO., a corporation, Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Stanley A. Nelson, a general building contractor, filed his action against defendant, R. Berry Roofing Co., a corporation, for damages allegedly caused by the defendant in completing and repairing the roof it had placed upon an addition to a school gymnasium built by the plaintiff. The trial court heard the cause without a jury, found against the defendant and entered judgment for $1,785.44 from which the defendant appeals.

The record reveals that the parties entered into a subcontract on February 14, 1951, to complete the roofing of a new gymnasium addition for Calumet School District #132. After subcontractors had erected and installed the I-beams holding the flat gymnasium roof and a concrete-like slab deck, defendant laid thereon the roof involved in this action. Defendant began its work early in October, 1951, and, after three or four days, completed the job on the 12th. Thereafter, through October, November and December, 1951, and January and February, 1952, the roof dripped and leaked. Defendant returned in November, and again in December, to make extensive repairs to the southern portion of the roof. About one-half or three-quarters of the roof

was gravel-scraped and the four original layers of tarred felt recapped with another ply of felt, pitch and gravel. From December 3, 1951, to February 1, 1952, defendant did no work on the gymnasium roof. In January, the finished gymnasium floor was put in. The roof continued to drip but no serious damage occurred to the floor until February 3rd and 4th when rainwater poured through a hole or tear in the roof down on the gymnasium floor, cupping and curling it and causing damage to the floor, which plaintiff was required to have redone by the flooring subcontractor and for which he seeks recovery in this action.

Defendant's principal contention on this appeal is that the plaintiff failed to prove by a preponderance of the evidence that defendant tore or caused the tear in the roof. On this point the record reveals that the plaintiff on the last day of January, a Thursday, phoned Berry and asked him to repair one more leak in the northeast portion of the roof. They had been using a can up on the I-beam for three months--it had to be emptied every three days--to catch the dripping caused by the leak. No specific date for the repair was agreed upon. Berry testified that he received that call late on Friday, immediately notified one of his employees, Dennis Roe, to go over and look at it. Roe was just getting off work and did not arrive at the school until about 6:00 P.M., found it locked and left. He testified that he returned the following morning, Saturday, the 2nd of February, about 9:30 or 10:00 A.M. He was there,

according to Berry, for the purpose of sweeping the gravel from the north 10 feet of that roof. Nelson apparently knew nothing about this and first learned of it when, on February 4, Monday, he arrived at the school at the request of Olmstead, the school district superintendent, who that morning had found the floor flooded. Berry arrived a few moments afterward. Together, he and Nelson discovered the slit or tear in the roof paper below the drain. Water caught in the deflection was pouring in. Nelson testified that the slit, about four or six inches wide, was at the end of one of the scraping bars appearing on the roof where the gravel had been scraped from the paper. He was corroborated in this by three of his employees who were with him at the time. He testified, "Berry, that looks like one of your men's work." Berry replied, "It sure does. Why didn't the darn fool put some cement over it?" Berry denied he said this and contended that Nelson's men had done it, apparently with their scoop or coal shovels that Monday afternoon in their attempt to remove the water into buckets. The record reveals this could not have been since the water had leaked through the opening Sunday and early Monday, long before the arrival of Nelson's men. Berry also denied that the tear was straight. He testified that it looked like two sides of a rectangle, about six inches on one side, eight inches on the other; like a triangle, with the flap slightly raised.

Plaintiff several times testified that he saw scraping bars on the roof's northeastern surface. At the end of one was

the slit. Berry at no time denied or admitted, directly, that scraping bars marked the northeastern surface. The court stated to Berry that plaintiff had testified about a scraping instrument scraping off gravel running in a certain direction. Berry stated that he didn't know where plaintiff got the scraper but that plaintiff had testified that a scraper had been used to scrape the gravel from the outside of the roof toward the center. If that had been the case, Berry continued, the tear could not possibly have been that way. It would have been on the other side of the square. Previously, Dennis Roe, an employee of plaintiff, said he started to sweep to remove the gravel on the southern portion and worked his way north. Then he worked toward the east sweeping the gravel toward the part that was reroofed, i.e., the south. The court in following up its questioning asked Berry, "Well, with that kind of path leading to that tear, I mean where the gravel was denuded." Berry answered, "The gravel was not really denuded from any place because there is always a certain amount that sticks." The court asked a further question: "I am trying to bear in mind Mr. Nelson's testimony about the indication of a pathway as if made by a scraper, which stopped at a certain point." Berry's answer was, "Oh, no, sir. There was nothing at all like that. There was a lot of water laying over here...." By his testimony, Berry does not categorically, clearly and unambiguously deny that the northeast surface of the roof bore scrape marks. His testimony is not straightforward.

It is not responsive. It is evasive. Inadvertently, he himself even testified that "the gravel was not really denuded...because there is always a certain amount that sticks." This, when taken with his other testimony, appears to us as an admission that the roof surface at that point bore marks resembling those made by a scraper.

Berry next testified that the type of truck driven by Roe on February 3 was what was called a ready roofing and shingle truck. It had in it no materials used in built-up roofing. Roe, Berry continued, was a steep roofer and shingler. There was no scraper on the truck. When Roe testified he said that during the winter months the first quarter of the year, he was employed at repairing flat roofs. At a further point he testified he was employed to do labor work, sweeping, for example; that he did not lay roofs, was not a roofer. The nature of his work was repairing leaks due to water pressure on the roofs. He said they used scrapers or spuds in getting gravel off the roofs. In apparent contradiction of the statement of his employer, Berry, that he was a steep roofer and shingler, Roe said that the equipment on the truck consisted of a long ladder, short ladders, and yellow corn brooms or street brooms; that on the day in question he did not have a scraper on the truck; that what he had was part of the truck's regular equipment. No explanation is made of the use of push or corn brooms by a steep roofer and shingler.

Roe flatly contradicted the testimony of his employer, defendant Berry. His testimony, furthermore, is inconsistent

and contradictory. The "equal credibility" contended for here by the defendant has no application. On the face of the record which we have carefully examined, we see no equality of credibility on the part of the witnesses and parties to this action. The trial judge further saw and heard them and we would not be warranted in reversing him.

Lastly, defendant contends that it is not liable because it had completed its contract with plaintiff October 12, 1951, had transferred full control and possession of the roof to the plaintiff and, thereafter, because of the guarantee bond issued by the Ruberoid Company in January, 1952, merely acted as the agent of the Ruberoid Company. The last part of this contention negates the first. It actually continued to effect extensive and minor repairs to the roof beyond October, 1951. Mr. Berry himself testified that his company had not as yet completed the work, that its men had left gravel piles up there for that reason. While it is true that Ruberoid guaranteed the work to the owner, Calumet School District #132, it did not guarantee leaks, etc., not caused by "normal wear and tear of the elements." There is no evidence in the record to support a finding that such was the cause of any leak involved in this action. The defendant, consequently, did not return to repair the roof as Ruberoid's agent, for none of the leaks or work done was contemplated by the provisions of its bond.

The judgment is affirmed.

Judgment affirmed.

Schwartz, P. J., concurs.
Tuohy, J., took no part.

168 A

13 I.A.2d 577

46277

PILSEN LAUNDRY AND DRY CLEANING CO., Inc., a corporation, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
AMERICAN EMPLOYERS' INSURANCE COMPANY, a corporation, Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

The Pilsen Laundry and Dry Cleaning Co., Inc., plaintiff, filed its action to recover damages sustained to its boiler, which was allegedly covered by a policy of insurance issued by the defendant. Trial was had and a jury found the defendant guilty and assessed plaintiff's damages at $654. The court assessed attorney fees against the defendant in the amount of $112. Judgment was entered against the defendant for $766.

The principal question involved in this appeal is whether the damage to plaintiff's boiler was covered by the policy of insurance issued by the defendant. The clause in question of the policy reads as follows:

"Definition of Accident....

"3. A sudden and accidental burning or bulging of the Object, or any part thereof, which is caused by pressure of steam or water within the Object or which results from a deficiency of steam or water therein and which immediately prevents or makes unsafe the continued use of the Object;..."

In its complaint the plaintiff alleged that its boiler was damaged by a sudden and accidental burning which resulted from a deficiency of water therein

and which immediately prevented or made unsafe the continued use of the boiler and its parts. Defendant in its brief concedes that if the boiler was damaged by a sudden and accidental burning it was covered by the accident clause of the policy. It contends, however, that plaintiff did not sustain the burden of proof on this point and that the evidence offered clearly showed that the damage was caused by leakage at the boiler fittings or joints and was thus excluded from coverage.

The record reveals that on August 1, 1952, an inspector of defendant examined the boiler. He made no recommendation for repairs. The accident happened eighteen days later on August 19, 1952. Plaintiff's maintenance engineer testified that when he left the laundry to get a cup of coffee the boiler was in good shape. When he returned about four or five minutes later the boiler was leaking, particularly at the back end. He looked for trouble and "found burning." The president of plaintiff corporation testified that on the day of the accident the electric control was not operating, which indicated that the water was low in the boiler; that after the accident its tubes were warped. They were leaking. He didn't know whether the tubes were burned or not. The boiler contractor who made the repairs said that the damage was caused by a deficiency of water; that the fuse plug was melted; and that this was the result of the burning of the boiler. He concluded from his

examination that this was a burned boiler.

The only testimony offered on behalf of the defendant was that of a boiler inspector who went to plaintiff's plant the afternoon of the accident. He found men repairing the boiler and rolling the tubes. None of the metal was discolored. He found no damage.

There is conflicting evidence as to what caused the damage to the boiler. We are of the opinion it clearly was a question of fact for the jury. They found for the plaintiff. The trial judge who heard and saw the witnesses approved the verdict by his denial of defendant's motions. It is a well-known rule of law that when the evidence is contradictory this court will not substitute its judgment for that of the trial court unless the findings are manifestly against the weight of the evidence. They were not. Under the circumstances we see no reason to reverse the case on this ground.

The next question that defendant raises is that the court erred in giving the jury an instruction with respect to the construction of doubtful language in a contract. The insurance policy sued on was introduced in evidence. No objection was offered by the defendant. The jury took it with them to the jury room. Under the circumstances this was not reversible error.

Defendant's next contention is that the court should not have allowed attorney fees to the plaintiff. It contends that its refusal to pay under the policy was

not vexatious and without reasonable cause. The court allowed the attorney fees under the provisions of par. 767, chap. 73 of the 1953 Illinois Revised Statute:

> "In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance...if the company has...refused upon demand prior to the commencement of the action to pay the amount of the loss, and it appears to the court that such suit or refusal is vexatious and without reasonable cause, the court may allow...reasonable attorney fees...." (Emphasis ours.)

It is apparent from our statement of the facts that the defendant had a legal right to have the court pass on the issues. There were material questions of fact and we are of the opinion that the trial court erred in allowing attorney fees. This, however, is an error which can be corrected by a remittitur. Upon the filing of a remittitur by the plaintiff in the sum of $112, the amount allowed as attorney fees, in the office of the clerk of this court within ten days, thereby reducing the judgment to $654, judgment will be affirmed; otherwise the judgment is reversed and the cause remanded with directions to proceed in a manner consistent with the views herein expressed.

Judgment affirmed upon remittitur by plaintiff of $112; otherwise judgment reversed and cause remanded with directions.

Schwartz, P. J., concurs.
Tuohy, J., took no part.

Gen. No. 10794 Agenda No. 25.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1954.

R. J. CHAMBERLAIN MOTOR COMPANY, Plaintiff-Appellee, vs. JAMES SWITZER and MRS. MAYME SWITZER, Defendants. (Mrs. Mayme Switzer, Appellant.)	Appeal from Circuit Court of Kankakee County, Illinois.

WOLFE,-- P. J.

The R. J. Chamberlain Motor Company procured a judgment by confession on a promissory note against James Switzer and Mrs. Mayme Switzer in the Circuit Court of Kankakee County, Illinois. This judgment was procured on February 26, 1954. On March 9, 1954, Mrs. Mayme Switzer filed a motion supported by affidavit to open up the judgment and for leave to plead. This motion was denied by the Court and this appeal follows:

The principal reasons stated by Mrs. Switzer in her motion to open up the judgment, are as follows: "Said note was signed by the defendant, Mrs. Mayme Switzer, solely

because of a false and fraudulent statement made to her by an agent of the plaintiff, who induced her to sign said note by representing to her that said note was for the down payment on a certain trailer which defendant, James Switzer, was then purchasing from plaintiff. Said statement of said agent was false and known by said agent to be false at the time of the making thereof, and said statement was believed by defendant, Mrs. Mayme Switzer, to be true, and in reliance upon said statement she signed said note without reading the same, although she would not have signed said note if she had known of the falsity of said statement of said agent.

"Contrary to said representation said note was not a note for the down payment on said trailer, but was a note for the entire purchase price of said trailer, less such down payment, if any, which the said James Switzer made on said trailer."

The note in question states on its face that it was given pursuant to a contract entered into between the parties for the sale of a trailer, and provides that if default is made in the payment thereof, that a judgment by confession may be taken against the makers of the note, including the amount due on the note, interest thereon and twenty percent attorney's fees for taking judgment on the note.

It is agreed by counsel both for the appellant and appellee that the only question presented to this Court is, 'that when a motion is made to open up a judgment by confession,

Because of a false and fraudulent representation made to him by an agent of the plaintiff, one Lathrop, he was induced to sign said note by representations to the effect that he was the owner of a certain tract of land, and that said note was to be used in a certain transaction, which transaction, was also misleading from plaintiff's. Said statement of such agent was false and known by said agent to be false at the time of the making thereof, and said plaintiff was induced by instructions, from, defendant, to be true, and to relinquish upon said statements the signed note. Defendant therefore, the same, although the signed note, is-based upon which he would not have signed said note if he had not been of the falsity of said statement of said agent.

Contrary to this representation said note was, in a case for the loan agent of said trustee, but was a note for the-entire purchase price of said property, into and from payment, if any, other than said loan agent made to said trustee."

The note in question, which is for the sum that is the sum payable pursuant to a contract entered into between the parties for the sale of a lot, and provides that if default is made in the payment thereof, then a judgment or confession may be taken against the maker of the note, for standing the amount due on the note, interest thereon and thereby insurance attorneys fees for which judgment is the note.

It is agreed by counsel that the sole questions and question that the only question presented in this CASE is, which of a number of the note is, or, plaintiff's

the only matters considered are whether the motion and supporting affidavits disclose a prima facie defense to the note and whether the defendant was diligent in presenting the defense.' Mrs. Switzer admits that she signed the note, but says she was induced to do so by the false and fraudulent statements made to her by the agent of the plaintiff by representing that the amount of the note was a down payment on the trailer, but which it turned out to be the purchase price of the trailer. Who the agent was, or what authority he had to make any representations to the defendant in regard to the note, are not stated in the motion or affidavit. There is no reason stated why Mrs. Switzer could not have read the note before she signed it. She does not claim that the note was for more than she assumed it to be, but just says that instead of being a down payment on a trailer, it was the whole purchase price. It is hard to conceive just what difference this would make in regard to her signing the note. A statement that the agent said that it was for a down payment on the trailer when in fact it was for the full purchase price, is the only misrepresentation she claims the agent made to induce her to sign the note.

It is contended by the appellant that it was through the fraud of the agent of the plaintiff that she was induced to sign the note. To show a prima facie defense of fraud it must be established that the representations complained of were false, that they related to matters material to the transaction, that the party making the false representations

knew them to be false, and the injured party, exercising ordinary prudence, relied upon them to his injury. As before stated, who the agent was that she claimed to have made the misrepresentations in regard to the note and whether he had any authority to represent the plaintiff in making such representations, are facts pertinent to the issues in this case. The false representations, if any, were matters not material to the issues in this case. It makes little difference to the defendant whether this note was for a full payment, or only a partial payment on the trailer in question, and there is not sufficient showing of fraud to justify the Court in setting aside the judgment on that ground. It is our conclusion that considering the whole motion and affidavit, that the Court properly found that there were not sufficient facts shown that would justify setting aside the judgment in the case.

The appellant also insists that the Court in allowing an attorney's fee of $412.62 to the plaintiff for filing the suit for judgment by a confession, is wholly unreasonable, and for that reason alone the judgment should be set aside, as the affidavit of the attorney for the defendant states that $25.00 would be a reasonable amount to allow for the attorney's fees in such cases. We agree with the appellant that $412.62 attorney's fees in such a case is exorbitant, and should never be allowed, unless there were other facts and circumstances in the case to show why such a fee was allowed. Neither the appellant nor the appellee, and an

exhaustive search by this Court, have been able to find any case similar to the one that is presented to us now. The note itself provided that if a judgment were taken on the note, that twenty percent of the amount due on the note with interest thereon, then the Court should allow the plaintiff an attorney's fee of such amount, and the defendants agreed to pay the same. We know of no way in a suit at law how the defendant can be relieved from this burdensome obligation. Cases have been cited by appellant where large fees have been condemned by the Court, but an examination of all of them there is some reason given by the Court why such fees are not approved, but none of them are where the amount is contracted for in the note itself, as it is in the instant case. We know of no rule of law that would permit this Court to say that the judgment appealed from should be opened up, and set aside on account of the exorbitant attorney's fee, and on the whole we find that the judgment appealed from should be affirmed.

Affirmed.

(Judge DeWitt S. Crow took no part in this opinion)

(Judge DeWitt S. Crow took no part in this opinion)

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